

# **CUSTOMS BULLETIN AND DECISIONS**

**Weekly Compilation of**

**Decisions, Rulings, Regulations, Notices, and Abstracts**

**Concerning Customs and Related Matters of the**

**U.S. Customs Service**

**U.S. Court of Appeals for the Federal Circuit**

**and**

**U.S. Court of International Trade**

**VOL. 35**

**JULY 25, 2001**

**NO. 30**

*This issue contains:*

U.S. Customs Service

T.D. 01-53

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**DEPARTMENT OF THE TREASURY  
U.S. CUSTOMS SERVICE**

## NOTICE

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# U.S. Customs Service

## *Treasury Decision*

(T.D. 01-53)

### EXTENSION OF CUSTOMS APPROVAL FOR SGS CONTROL SERVICES, INCORPORATED AS A COMMERCIAL GAUGER

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of an Extension of Customs Approval for SGS Control Services, Inc. as a Commercial Gauger.

SUMMARY: SGS Control Services, Inc. of Houston, Texas, has applied to U.S. Customs under Part 151.13 of the Customs Regulations for an extension of Customs approval as a commercial gauger for their Pasadena, Texas site, to gauge petroleum product, animal and vegetable oils, and organic compounds. Customs has determined that this company meets all of the requirements for an extension of Customs approval as a commercial gauger. Specifically, SGS Control Services, Inc., Pasadena, Texas, has been granted approval to gauge petroleum product under Chapter 27 and Chapter 29, animal and vegetable oils under Chapter 15 and organic compounds under Chapter 29 of the Harmonized Tariff Schedule of the United States (HTSUS). Therefore, in accordance with Part 151.13 of the Customs Regulations, SGS Control Services, Inc. is hereby approved to gauge the products named above.

LOCATION: SGS Control Services, Inc. approved site is located at, 530 North Witter, Pasadena, Texas, 77506.

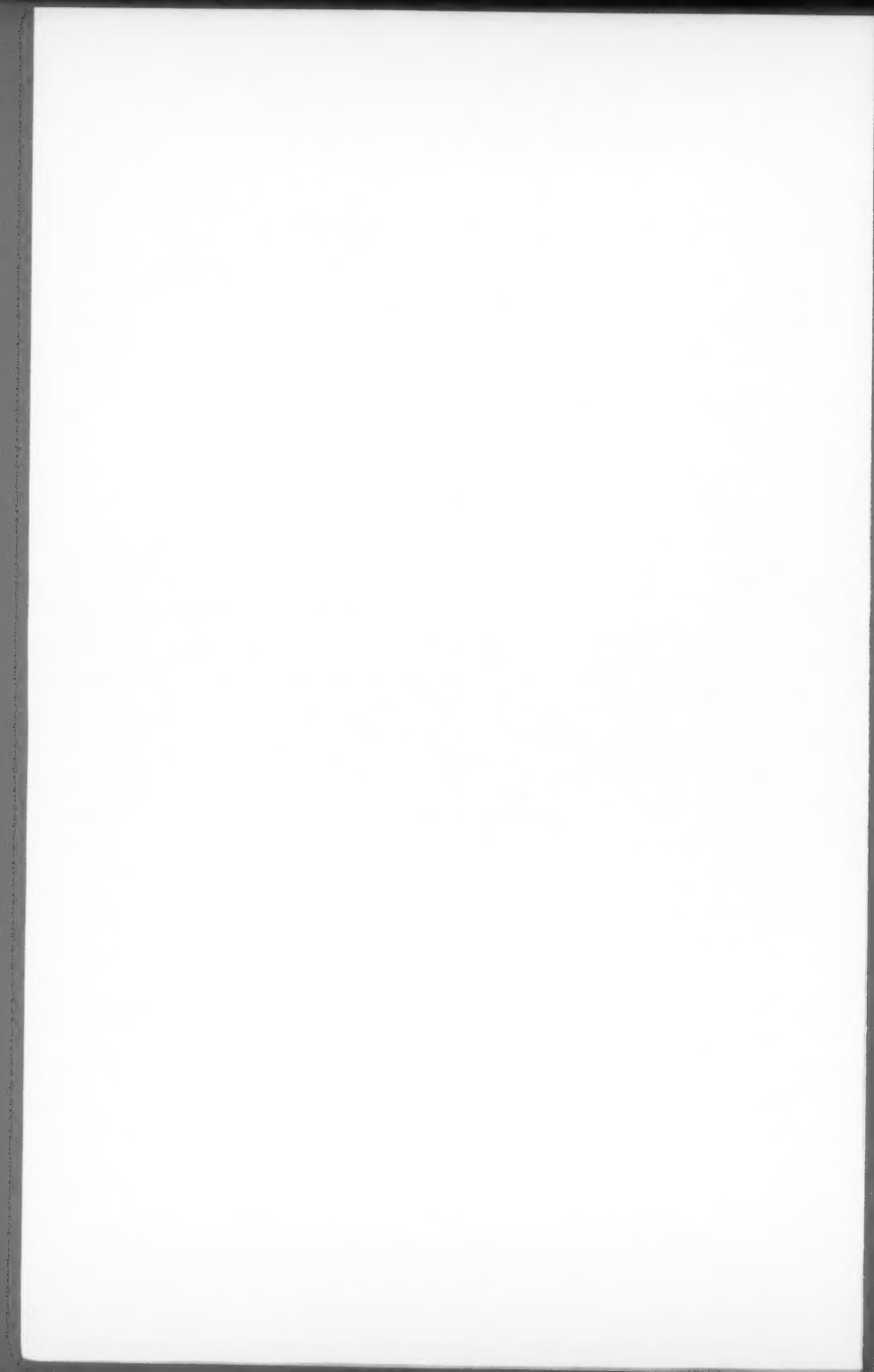
EFFECTIVE DATE: July 2, 2001

FOR FURTHER INFORMATION CONTACT: Michael Parker, National Quality Manager, Laboratories and Scientific Services, U.S. Customs Service, 1300 Pennsylvania Avenue, NW, Suite 1500 North, Washington, D.C. 20229, (202) 927-1060.

Dated: July 2, 2001.

IRA S. REESE,  
*Executive Director,  
Laboratories and Scientific Services.*

[Published in the Federal Register, July 12, 2001 (66 FR 36617)]



# U.S. Customs Service

## *General Notices*

### APPLICATION FOR RECORDATION OF TRADE NAME: "RED BULL NORTH AMERICA, INC."; CORRECTION

ACTION: Notice of application for recordation of trade name; correction.

SUMMARY: In a document published in the Federal Register on June 14, 2001, Customs announced that an application has been filed for recordation of the trade name "Red Bull North America, Inc." under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124). There was an error in that document regarding the trade name for which the application for recordation was filed. This document corrects that error.

#### CORRECTION OF PUBLICATION

In the Federal Register issue of June 14, 2001, in FR Document 01-14987, on page 32414, in the second column, correct the first sentence of the Summary paragraph to read as follows:

"Application has been filed pursuant to section 133.12, Customs Regulations (19 CFR 133.12), for the recordation under section 42 of the Act of July 5, 1946, as amended (15 U.S.C. 1124), of the trade name "Red Bull North America, Inc.""

Dated: July 6, 2001.

JOANNE ROMAN STUMP,  
*Chief,*  
*Intellectual Property Rights Branch.*

[Published in the Federal Register, July, 12, 2001 (66 FR 36617)]

DEPARTMENT OF THE TREASURY,  
OFFICE OF THE COMMISSIONER OF CUSTOMS,  
*Washington, DC, July 12, 2001.*

The following documents of the United States Customs Service, Office of Regulations and Rulings, have been determined to be of sufficient interest to the public and U.S. Customs Service field offices to merit publication in the CUSTOMS BULLETIN.

STUART P. SEIDEL,  
*Assistant Commissioner,  
Office of Regulations and Rulings.*

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MODIFICATION OF RULING LETTER AND REVOCATION OF  
TREATMENT RELATING TO TARIFF CLASSIFICATION OF  
CERTAIN CARRYING BAGS COMPOSED OF COTTON FIBERS  
AND COMPOSED OF MAN-MADE FIBERS

AGENCY: U.S. Customs Service; Department of the Treasury.

ACTION: Notice of modification of tariff classification ruling letter and revocation of treatment relating to the classification of certain carrying bags, respectively composed of cotton fibers and of man-made fibers.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930, 19 U.S.C. 1625(c), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that Customs is modify one ruling relating to the tariff classification, under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA), of certain carrying bags, respectively composed of cotton fibers and of man-made fibers. Customs is also revoking any treatment previously accorded by it to substantially identical merchandise. Notice of the proposed action was published in the CUSTOMS BULLETIN on June 6, 2001, Vol. 35, No. 23. No comments were received.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after September 24, 2001.

FOR FURTHER INFORMATION CONTACT: J. Steven Jarreau, Textile Classification Branch: (202) 927-2518.

SUPPLEMENTARY INFORMATION:

BACKGROUND

On December 8, 1993, Title VI, (Customs Modernization), of the North American Free Trade Agreement Implementation Act (Pub. L.

103-182, 107 Stat. 2057) (hereinafter "Title VI"), became effective. Title VI amended many sections of the Tariff Act of 1930, as amended, and related laws. Two new concepts which emerge from the law are "**informed compliance**" and "**shared responsibility**." These concepts are premised on the idea that in order to maximize voluntary compliance with Customs laws and regulations, the trade community needs to be clearly and completely informed of its legal obligations. Accordingly, the law imposes a greater obligation on Customs to provide the public with improved information concerning the trade community's responsibilities and rights under the Customs and related laws. In addition, both the trade and Customs share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended, 19 U.S.C. §1484, the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and provide any other information necessary to enable Customs to properly assess duties, collect accurate statistics and determine whether any other applicable legal requirement is met.

Pursuant to section 625(c), Tariff Act of 1930, 19 U.S.C. 1625(c), as amended by section 623 of Title VI, a notice was published in the CUSTOMS BULLETIN, Vol. 35, No. 23, proposing to modify NY C86606 (May 13, 1998) relating to the tariff classification of certain carrying bags of cotton and of man-made textile fibers, and to revoke any treatment accorded to substantially identical transactions. The period to submit comments expired on July 6, 2001. No comments were received.

The Customs Service in NY C86606 classified a certain textile carrying bag, cylindrical in shape and measuring approximately five (5) inches in diameter and twenty-nine (29) inches in length in subheading 4202.92.9026, HTSUSA.

It is now Customs position that the carrying case of the dimensions previously addressed is properly classified in subheading 4202.92.1500, HTSUSA, when composed of cotton fibers, and in subheading 4202.92.3031, HTSUSA, when composed of man-made fibers. Applying GRI 6 analysis at the eight digit level, subheadings 4202.92.15, HTSUSA, and 4202.92.30, HTSUSA, which respectively provide for "Travel, sports and similar bags: With outer surface of textile materials: Of vegetable fibers and not of pile or tufted construction: Of cotton" and "Travel, sports and similar bags: With outer surface of textile materials: Other" more specifically describe the "EASY SEAT" carrying cases than any other subheadings at the eight digit level. Subheading 4202.92.90, HTSUSA, in particular, is a residual subheading which generally provides for containers, such as binocular and camera cases, that are more specially shaped or internally fitted for particular contents. Headquarters Ruling Letter 962576 modifying NY C86606 is set forth as an attachment to this document.

Although in this notice Customs specifically refers to one New York Ruling Letter, this notice will cover any rulings on this merchandise that may exist but have not been specifically identified. Any party who

has received an interpretative ruling or decision (i.e., ruling letter, internal advice memorandum or decision or protest review decision) on the merchandise subject to this notice should have advised Customs during the comment period.

Similarly, pursuant to section 625(c)(2), Tariff Act of 1930, 19 U.S.C. 1625(c)(2), as amended by section 623 of Title VI, Customs is revoking any treatment previously accorded by Customs to substantially identical transactions. This treatment may, among other reasons, have been the result of the importer's reliance on a ruling issued to a third party, Customs personnel applying a ruling of a third party to importation of the same or similar merchandise, or the importer's or Customs previous interpretation of the HTSUSA. Any person involved in substantially identical transactions should have advised Customs during the comment period. An importer's reliance on treatment of substantially identical transactions or on a specific ruling concerning the merchandise covered by this notice that was not identified in the proposed notice may raise the rebuttable presumption of lack of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this final notice.

Pursuant to 19 U.S.C. 1625(c)(1), Customs is modifying NY C86606 and any other ruling not specifically identified to reflect the proper classification of the merchandise pursuant to the analysis set forth in HQ 962576. Additionally, pursuant to 19 U.S.C. 1625(c)(2), Customs is revoking any treatment previously accorded by the Customs Service to substantially identical transactions.

In accordance with 19 U.S.C. 1625 (c), this ruling will become effective 60 days after publication in the CUSTOMS BULLETIN.

Dated: July 10, 2001.

JOHN DURANT,  
*Director,*  
*Commercial Rulings Division.*

[Attachment]

## [ATTACHMENT]

## DEPARTMENT OF THE TREASURY

U.S. CUSTOMS SERVICE,  
Washington, DC, July 10, 2001.

CLA-2 RR:CR:TE 962576 jsj

Category: Classification

Tariff No. 4202.92.1500,

4202.92.3031, and 9401.90.5000

MR. ADOLFO SALDIVAR  
MR. FERNANDO TRUEBA  
A.A. CUSTOMS BROKERS  
6930 Market Avenue  
Suite H 6  
El Paso, TX 79917

Re: Reconsideration and modification of NY C86606; "EASY SEAT" folding chair components; Textile seat bottom, backrest and carrying case; Subheadings 4202.92.1500, 4202.92.3031 and 9401.90.5000, HTSUSA; General Rule of Interpretation 5(a).

## DEAR GENTLEMAN:

The purpose of this ruling letter is to respond to your correspondence of September 11, 1998 and January 14, 1999 requesting, on the behalf of your client Banjo, LLC, reconsideration of New York Ruling Letter (NY) C86606.

The Customs Service was provided two samples and four pages of marketing literature. The first sample consists of an assembled "Easy Seat" chair. The assembled chair includes a folding tubular metal frame with plastic corner attachments, a textile chair seat bottom with four metal grommets, a textile chair backrest with foam padding and a textile carrying case. The second sample consists only of the textile chair seat bottom, backrest and carrying bag. The second sample did not include the tubular metal frame, nor was it in a condition to be assembled.

This reconsideration is being issued subsequent to a review of your previously addressed correspondence, as well as, your correspondence of October 27, 2000, an examination of the samples and a telephone conversation conducted with a member of my staff on July 27, 2000. In accordance with the understanding of the Customs Service ascertained from your correspondence of September 11, 1998 and the telephone conversation of July 27, 2000, this reconsideration will only address that aspect of NY C86606 which classified the items included in sample two. This reconsideration will, therefore, only address the importation of the textile chair seat bottom, textile chair backrest and textile carrying case.

This correspondence is also to advise you that NY C86606, as it relates to the classification of the "EASY SEAT" textile carrying case, is being modified. The analysis modify the classification of the carrying case in NY C86606 is addressed in this ruling letter.

Pursuant to section 625(c), Tariff Act of 1930, as amended, 19 U.S.C. 1625(c), notice of the proposed modification of NY C86606 was published on June 6, 2001, in the CUSTOMS BULLETIN, Vol. 35, No. 23. No comments were received.

*Facts:*

The articles at issue in this reconsideration are the textile components of the "EASY SEAT" chair included in the second sample. They include the textile chair seat bottom, the textile backrest and the textile carrying case. The Customs Service has been advised that the seat bottom, backrest and carrying bag for any particular chair will be composed of the same textile material. The material will be a fabric of canvas, cordura or vinyl according to your correspondence. *Correspondence of A.A. Customs Brokers*, Oct. 27, 2000. This office understands your correspondence to indicate that the canvas textile material will be made of cotton fibers and the cordura and vinyl textile materials will be of man-made fibers.

Customs has additionally been advised for the purposes of this ruling that the items will be imported together.

The textile chair seat bottom measures nineteen (19) inches by nineteen (19) inches square. The sample is composed of a textile material of man-made fibers with sewn edges. It is the understanding of the Customs Service that the sample submitted is the beginning stage in the manufacture of the seat bottom. It is specifically noted that the sample does not have grommets or holes cut in the corners through which the metal frame may be extended and attached.

The textile chair backrest measures five and one-half (5-1/2) inches by nineteen (19) inches. It has interior foam padding that is three-fourths (3/4) of an inch thick.

The textile carrying case is cylindrical in shape and measures approximately five (5) inches in diameter and twenty-nine (29) inches in length. It has an adjustable carrying strap sewn onto the side of the bag. The strap is made of one-hundred (100) percent nylon webbing and is approximately one and one-half (1-1/2) inches wide. It has two plastic clips that enable the strap to be adjusted. A braided drawstring cord composed of one-hundred (100) percent polypropylene textile material secures the bag closed at the top.

*Issue:*

What is the classification pursuant to the Harmonized Tariff Schedule of the United States Annotated, of the textile chair seat bottom, textile chair backrest and textile carrying case, when imported together?

*Law and Analysis:*

The responsibility for interpreting and applying the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) rests with the U.S. Customs Service.<sup>1</sup> The Customs Service, in accordance with its legislative mandate, classifies imported merchandise pursuant to the General Rules of Interpretation (GRI)<sup>2</sup>.

General Rule of Interpretation 1 provides, in part, that classification decisions are to be "determined according to the terms of the headings and any relative section or chapter notes." *General Rule of Interpretation 1*. Although GRI 1 further indicates that merchandise which can not be classified in accordance with the dictates of GRI 1 should be classified pursuant to the other General Rules of Interpretation in their sequential order, the Explanatory Notes (EN) "make it quite clear that the terms of the headings and any relative Section or Chapter Notes are paramount \* \* \*." *Explanatory Note (V), General Rules for the Interpretation of the Harmonized System, General Rule of Interpretation 1*.

The Explanatory Notes constitute the World Customs Organization's official interpretation of the Harmonized System at the international or six-digit level. See Joint Explanatory Statement *supra* note 1, at 549. They provide commentary and are generally indicative of the proper interpretation of the headings of the HTSUSA. *Id.* The EN, although a valuable interpretative reference, have not been enacted into law in the United States and are not, therefore, legally binding or dispositive of classification issues. See T.D. 89-80, 54 Fed. Reg. 35127-28 (Aug. 23, 1989); *Lonza, Inc. v. United States*, 46 F.3d 1098, 1109 (Fed. Cir. 1995).

Heading 9401 provides for the classification of "Seats (other than those of heading 9402), whether or not convertible into beds, and parts thereof." *Heading 9401, HTSUSA*. The Explanatory Notes to heading 9401, HTSUSA, indicate that this heading is intended to provide for the classification of a number of different types of seats, including "folding chairs," as well as, for the classification of "identifiable parts of chairs." *Explanatory Note 94.01*. A non-exhaustive listing of "identifiable parts of chairs" in EN 94.01 includes seat backs and seat bottoms. See *Id.*

Although heading 9401, HTSUSA, provides for the classification of identifiable seat parts, only the seat back is a completed part. The issue that must be resolved through the application of GRI 2 with regards to the seat bottom is whether the seat bottom, which lacks holes or grommets, is sufficiently complete for the Customs Service to conclude that it possesses the "essential character" of a seat bottom. *General Rule of Interpretation 2(a)*. General Rule of Interpretation 2(a) sets forth the classification principle that an incomplete or unfinished article is classified as a complete or finished article, provided the article possesses the "essential character" of the completed or finished article at the time of entry. *Id.*

It is the conclusion of the Customs Service that the "EASY SEAT" seat bottom is sufficiently complete that it possesses the "essential character" of a completed chair seat bottom. *Id.* The seat bottom is, in the terms used by the Explanatory Notes, a "blank." *Explanatory Notes, General Rules for the Interpretation of the Harmonized System, General Rule of Interpretation 2(a) (Incomplete or unfinished articles)*. The seat bottom has the "essential shape \* \* \* of the finished article or part" and may only be used, except in excep-

<sup>1</sup> See Joint Explanatory Statement of the Committee of Conference, H.R. Conf. Rep. No. 100-576, at 549 (1988) reprinted in 1988 U.S. Code Cong. and Adm. News 1547, 1582 [hereinafter Joint Explanatory Statement].

<sup>2</sup> See 19 U.S.C. 1202 (West 1999).

tional cases, for completion into the finished article or part. *Id.* See generally HQ 964202 (Oct. 25, 2000) (discussing GRI 2(a), blanks and semi-manufactures).

Classification of the chair seat bottom and seat back at the subheading level requires reference to General Rule of Interpretation 6. General Rule of Interpretation 6 states that the principles of GRI 1 through GRI 5 should be applied when classifying articles at the subheading level and that only subheadings at the same level are comparable. See *General Rule of Interpretation 6*.

The seat bottom and seat back, in accordance with GRI 6, are properly classified in subheading 9401.90.5000, HTSUSA. Subheading 9401.90.5000, HTSUSA, provides:

9401 Seats (other than those of heading 9402), whether or not convertible into beds, and parts thereof:

9401.90 Parts:

Other:

9401.90.5000 Other:

Heading 4202, HTSUSA, provides for:

Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber, or of paperboard, or wholly of mainly covered with such materials or with paper.

The textile bag to be imported with the seat bottom and seat back, although not designated *eo nomine* (that is by name) in heading 4202, HTSUSA, is similar or *ejusdem generis* (of the same kind) with those containers enumerated in the second part of the heading. See generally *Totes v. United States*, 69 F.3d 495, 498 (Fed. Cir. 1995) citing *Sports Graphics v. United States*, 24 F.3d 1390, 1392 (Fed. Cir. 1994) (discussing the statutory construction of the rule of *ejusdem generis*). The second part of heading 4202, HTSUSA, is that part which follows the semicolon. The "EASY SEAT" carrying bag, in accordance with the *Totes* decision, is *ejusdem generis* with the items designated *eo nomine* in heading 4202, HTSUSA, because it is designed to organize, store, protect and carry the "EASY SEAT" chair. See *Totes, Id.*

Completing the classification of the carrying case in accordance with GRI 6, the carrying bag composed of cotton fibers is classified in subheading 4202.92.1500, HTSUSA, and the carrying bag composed of man-made fibers is classified in subheading 4202.92.3031, HTSUSA. Subheadings 4202.92.1500, HTSUSA, and 4202.92.3031, HTSUSA, provide for:

4202 Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber, or of paperboard, or wholly of mainly covered with such materials or with paper:

Other:

4202.92 With outer surface of sheeting of plastic or of textile materials: Travel, sports and similar bags:

With outer surface of textile materials:

Of vegetable fibers and not of pile or tufted construction:

4202.92.1500 Of cotton.

\* \* \* \* \*

4202.92.30 Other:

Other:

Of man-made fibers:

4202.92.3031

Other:

(Emphasis added.)

The "EASY SEAT" carrying case, which will be made of canvas, cordura or vinyl with a nylon carrying strap and a polypropylene braided drawstring, is a container similar to trav-

el or sports bags composed of an outer surface of cotton or man-made textile material. This comports with Additional U.S. Note 1 to Chapter 42, HTSUSA, which defines "travel, sports and similar bags" to include bags "of a kind designed for carrying clothing and other personal effects during travel \* \* \*." See Chapter 42, Additional U. S. Note 1. Although Additional U.S. Note 1 defines "travel, sports and similar bags" as bags "of a kind designed for carrying clothing and other personal effects during travel \* \* \*" the Customs Service has consistently interpreted the note to address bags suitable for carrying "clothing" and/or "other personal effects." It is the conclusion of the Customs Service that this interpretation of the note most accurately achieves the intent of Congress.

The Customs Service, in NY C86606, classified the textile carrying case in subheading 4202.92.9026, HTSUSA. As addressed in the preceding paragraphs, it is the determination of Customs that the correct subheadings are subheading 4202.92.1500, HTSUSA, for those carrying cases composed of cotton fiber, and subheading 4202.92.3031, HTSUSA, for those carrying cases composed of man-made fibers. Applying GRI 6 analysis at the eight digit level, subheadings 4202.92.15, HTSUSA, and 4202.92.30, HTSUSA, which respectively provide for "Travel, sports and similar bags: With outer surface of textile materials: Of vegetable fibers and not of pile or tufted construction: Of cotton" and "Travel, sports and similar bags: With outer surface of textile materials: Other" more specifically describe the "EASY SEAT" carrying cases than any other subheadings at the eight digit level. Subheading 4202.92.90, HTSUSA, in particular, is a residual subheading which generally provides for containers, such as binocular and camera cases, that are more specially shaped or internally fitted for particular contents.

Classifying the "EASY SEAT" carrying case at the ten digit level, carrying cases made of canvas are classified in subheading 4202.92.1500, HTSUSA, and carrying cases made of cordura or vinyl are classified in subheading 4202.92.3031, HTSUSA.

The importer's customs broker suggests the "EASY SEAT" textile carrying case is properly classified in subheading 6307.90.9989, HTSUSA. This office reviewed heading 6307, HTSUSA, and concludes in accordance with the dictates of GRI 1 that heading 4202, HTSUSA, more accurately describes the article than heading 6307, HTSUSA, which provides for "Other made up articles, including dress patterns." *Heading 6307, HTSUSA.*

The importer's broker additionally suggests that NY C86606 which classified the carrying case in heading 4202, HTSUSA, should be revoked based on HQ 961294 (June 17, 1998). Headquarters Ruling Letter 961294 revoked NY C80418 (Oct. 20, 1997) and classified a storage bag for a removable automobile hardtop in heading 6307, HTSUSA. The Customs Service in HQ 961294 stated that the storage bag in issue was designed to protect and store, but was not principally designed to organize or carry the removable hardtop.

It is the conclusion of this office that the storage bag in issue in HQ 961294 is not analogous to the "EASY SEAT" carrying case. The "EASY SEAT" carrying case sufficiently possesses the four characteristics set forth in the *Totes* decision to make the carrying case similar or of the same kind of containers enumerated in heading 4202, HTSUSA.

The Customs Service additionally reviewed General Rule of Interpretation 5(a) to determine if the carrying case should be classified with the "EASY SEAT" textile seat bottom and textile backrest. General Rule of Interpretation 5(a) provides, in pertinent part:

Camera cases, musical instrument cases, gun cases, drawing instrument cases, neck-lace cases and similar containers, specifically shaped or fitted to contain a specific article or set of articles, suitable for long-term use and entered with the articles for which they are intended, shall be classified with such articles when of a kind normally sold therewith. (Emphasis added) *General Rule of Interpretation 5(a).*

It is the decision of this office that GRI 5(a) is not applicable to the instant merchandise. General Rule of Interpretation 5(a) specifically mandates that in order for a container to be classified with the article which it is designed to carry, it must be entered with that article. See *Id.* The instant carrying case is designed to contain the "EASY SEAT" chair. The factual circumstances presented to the Customs Service in this request for reconsideration specifically indicate that the carrying case is entered only with the textile seat bottom and the textile backrest. Since the carrying case will not be entered with the finished "EASY SEAT" chair, GRI 5(a) is not applicable.

#### *Holding:*

New York Ruling Letter C86606 has been reconsidered and to the extent that it addresses the textile carrying case is MODIFIED.

The "EASY SEAT" textile carrying case, whether imported separately or with the textile chair seat bottom and textile chair backrest, when composed of cotton fibers (canvas), is classified in subheading 4202.92.1500, HTSUSA. The General Column One Rate of Duty is six and six-tenths (6.6) percent, *ad valorem*.

The textile quota category for the carrying case of cotton fiber is 369.

The "EASY SEAT" textile carrying case, whether imported separately or with the textile chair seat bottom and textile chair backrest, when composed of man-made fibers (cordura or vinyl), is classified in subheading 4202.92.3031, HTSUSA. The General Column One Rate of Duty is eighteen and three-tenths (18.3) percent, *ad valorem*.

The textile quota category for the carrying case of man-made fibers is 670.

New York Ruling Letter C86606, to the extent that it addresses the textile chair seat bottom and textile chair backrest, when imported together, is AFFIRMED.

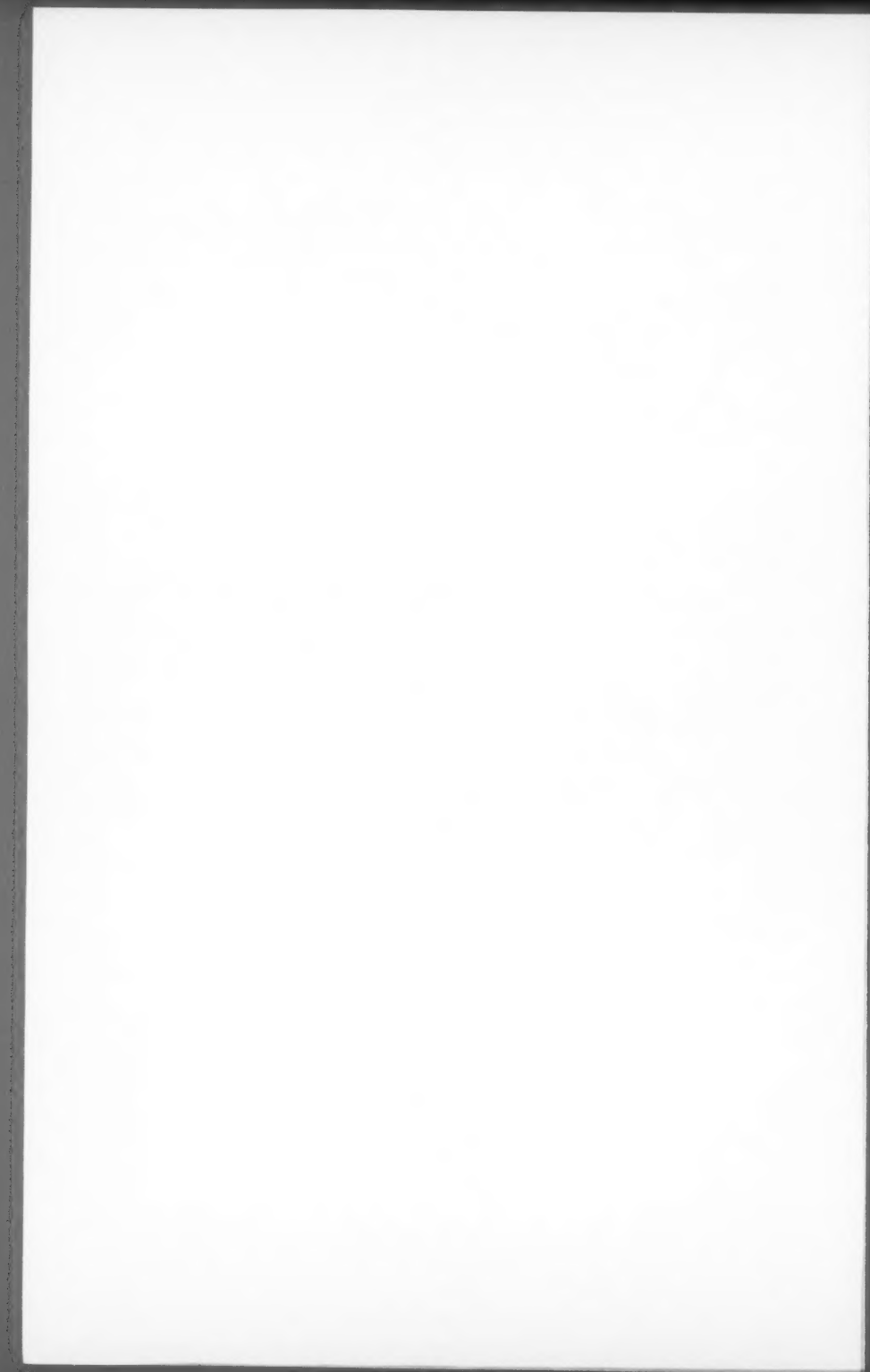
The textile seat bottom and the textile seat backrest are classified in subheading 9401.90.5000, HTSUSA. The General Column One Rate of Duty is Free.

It is recommended that Banjo contact its local Customs Service office prior to the importation of this merchandise to determine the current status of any restraints or requirements due to the changeable nature of the statistical annotation, the ninth and tenth digits of the HTSUSA, and the restraint (quota/visa) categories applicable to textile merchandise.

The designated textile and apparel category may be subdivided into parts. If subdivided, the quota and visa requirements applicable to the merchandise may be affected. It is recommended that Banjo review, close to the time of shipment, the Status Report On Current Import Quotas (Restraint Levels), since part categories are the result of international bilateral agreements and subject to frequent change. The Status Report is an internal issuance of the U.S. Customs Service and is available for inspection at local Customs Service offices.

New York Ruling Letter C86606 (May 13, 1998) is hereby modified. In accordance with 19 U.S.C. 1625 (c), this ruling will become effective 60 days after its publication in the CUSTOMS BULLETIN.

JOHN DURANT,  
Director,  
Commercial Rulings Division.



# U.S. Customs Service

## *Proposed Rulemaking*

19 CFR Part 177

RIN 1515-AC56

### ADMINISTRATIVE RULINGS

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Notice of proposed rulemaking.

SUMMARY: This document sets forth proposed amendments to those provisions of the Customs Regulations that concern the issuance of administrative rulings and related written determinations and decisions on prospective and current transactions arising under the Customs and related laws. The proposed regulatory changes include amendments to Customs procedures in response to statutory changes made to the administrative ruling process by section 623 of the Customs Modernization provisions of the North American Free Trade Agreement Implementation Act, as well as organizational changes to clarify current administrative practice and otherwise improve the layout and readability of the present regulatory texts. The proposed changes involve principally the following areas: the issuance of rulings and other written advice on prospective transactions; the appeal of prospective rulings after issuance; the modification or revocation of prospective rulings or of protest review decisions or of treatment previously accorded by Customs to substantially identical transactions; the limitation of court decisions; the issuance, appeal, and modification or revocation of internal advice decisions on current transactions; and the treatment of requests for confidential treatment of business information submitted to Customs in connection with a request for written advice.

DATES: Comments must be received on or before September 17, 2001.

ADDRESSES: Written comments (preferably in triplicate) may be addressed to the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments submitted may be inspected at the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service 1300 Pennsylvania Avenue, N.W., 3rd Floor, Washington, D.C.

FOR FURTHER INFORMATION CONTACT: John Elkins, Textiles Branch, Office of Regulations and Rulings (202-927-2380).

#### SUPPLEMENTARY INFORMATION:

##### BACKGROUND

Part 177 of the Customs Regulations (19 CFR Part 177) contains general provisions regarding the issuance of binding administrative rulings to importers and other interested persons with regard to prospective and current transactions arising under the Customs and related laws and also contains provisions covering the issuance of country-of-origin advisory rulings and final determinations relating to Government procurement. The provisions regarding binding rulings under the Customs and related laws, which constitute the primary focus of this document, are currently set forth in Subpart A of Part 177 and do not include rulings, determinations, or decisions under specific statutory authorities provided for elsewhere in the Customs Regulations (for example, in Part 133 for enforcement actions regarding intellectual property rights, in Part 174 for protests, and in Part 181 for advance rulings under the North American Free Trade Agreement). The provisions regarding Government procurement country-of-origin advisory rulings and final determinations are set forth in Subpart B of Part 177 and are not dealt with in this document.

On December 8, 1993, the President signed into law the North American Free Trade Agreement Implementation Act (Public Law 103-182, 107 Stat. 2057). Title VI of that Act contained provisions pertaining to Customs Modernization and thus is commonly referred to as the Customs Modernization Act or "Mod Act." The Mod Act included two statutory amendments that have particular relevance to the Part 177 regulatory provisions.

Section 640 of the Mod Act amended section 502 of the Tariff Act of 1930, as amended (19 U.S.C. 1502), which, in paragraph (a), sets forth the authority of the Secretary of the Treasury to promulgate rules and regulations for the appraisement and classification of merchandise. The Mod Act amendment involved the insertion of the following parenthetical expression in the paragraph (a) text: "(including regulations establishing procedures for the issuance of binding rulings prior to the entry of the merchandise concerned)."

Section 623 of the Mod Act extensively amended section 625 of the Tariff Act of 1930 as described above. The Mod Act amendment involved the following specific changes:

1. The then-existing text was designated as paragraph (a) and the following substantive changes were made within that text: the "120 days" time limit was replaced by "90 days"; and the reference to "any predecisional decision (including any ruling letter, internal advice memorandum, or protest review decision)" was replaced by a reference to "any interpretive ruling (including any ruling letter, or internal advice memorandum) or protest review decision."

2. A new paragraph (b) was added to provide that a person may appeal an adverse interpretive ruling, and any interpretation of any regulation prescribed to implement such ruling, to a higher level of authority within Customs for de novo review. The new paragraph (b) text further provides that, upon a reasonable showing of business necessity, the appeal must be considered and decided no later than 60 days following the date on which the appeal was filed.

3. A new paragraph (c) was added to require publication, in the CUSTOMS BULLETIN and with opportunity for public comment, of a proposed interpretive ruling or decision which would modify (other than to correct a clerical error) or revoke a prior interpretive ruling or decision which has been in effect for at least 60 days or which would have the effect of modifying the treatment previously accorded by Customs to substantially identical transactions. This new paragraph (c) text further provides: that interested parties must be given not less than 30 days after the date of publication to submit comments on the proposed ruling or decision; that, after consideration of any comments received, a final ruling or decision must be published in the CUSTOMS BULLETIN within 30 days after the closing of the comment period; and that the final ruling or decision will become effective 60 days after the date of its publication.

4. A new paragraph (d) was added to provide that a decision that proposes to limit the application of a court decision must be published in the CUSTOMS BULLETIN together with notice of opportunity for public comment prior to a final decision.

5. Finally, a new paragraph (e) was added to provide that the Secretary of the Treasury may make available in writing or through electronic media all information, including directives, memoranda, electronic messages and telexes which contain instructions, requirements, methods or advice necessary for importers and exporters to comply with the Customs laws and regulations, subject to any exemption from disclosure provided by the Freedom of Information Act (5 U.S.C. 552).

With regard to the amendment made by section 640 of the Mod Act, Customs does not believe that it is necessary to amend the existing Part 177 regulatory texts to implement this statutory amendment. Rather, Customs believes that it would be sufficient, as a matter of editorial clarity, to expressly refer to 19 U.S.C. 1502 in the authority citation for Part 177.

On the other hand, the amendment of section 625 effected by section 623 of the Mod Act clearly requires extensive modifications to the Part 177 texts, particularly to reflect requirements and procedures for the appeal and modification or revocation of rulings and for the limitation of court decisions. In addition, Customs has performed a detailed, overall review of the existing provisions within Subpart A of Part 177 and has concluded as a result of that review that a number of additional organizational and editorial changes should be made in order to update and otherwise enhance the clarity, application, and organization of those regulatory texts. The proposed changes set forth in this docu-

ment, other than those involving minor wording or other editorial changes, are discussed in more detail below.

#### OVERVIEW OF PROPOSED CHANGES

The principal proposed organizational changes set forth in this document involve the following:

1. Present § 177.0 (Scope) would be eliminated and its terms would be included as part of a new § 177.1 (a general overview of the Part) which, together with new § 177.2 (definitions) would comprise new Subpart A (general provisions). These changes are primarily intended to better explain the purpose and content of Part 177 and to facilitate the division of present Subpart A as described below.

2. Present Subpart B (country-of-origin advisory rulings and final determinations relating to Government procurement) would be redesignated as Subpart E, and present Subpart A would be divided into three new Subparts B (advice on prospective transactions), C (internal advice procedure) and D (disclosure of confidential business information). The division of present Subpart A is intended to achieve the following:

a. By treating the internal advice procedure (set forth at present in § 177.11) separately in Subpart C, the contextual and procedural distinctions between that current transaction procedure and the prospective advice procedure under Subpart B should be clearer; and

b. By covering the issue of confidential treatment of business information separately in Subpart D, those provisions can be expanded to reflect current Treasury and Customs procedures and practice and can apply equally and without unnecessary repetition to information submitted to Customs either under Subpart B or under Subpart C.

The principal proposed changes set forth in this document involve the following:

1. The following proposed changes would address statutory changes made by section 623 of the Mod Act as mentioned above:

a. Inclusion of appeal provisions for adverse prospective rulings (§ 177.20) and adverse internal advice decisions (§ 177.33);

b. Inclusion of a provision (§ 177.21) covering the modification or revocation of prospective rulings, internal advice decisions, protest review decisions, and treatment previously accorded by Customs to substantially identical transactions; and

c. Inclusion of a provision (§ 177.23) regarding publication of decisions that propose to limit the application of court decisions.

2. It is proposed to eliminate the principle of detrimental reliance (which was a purely regulatory creation) from the Part 177 texts because the Mod Act statutory amendments regarding the modification or revocation of rulings and previous treatment (including the provision for a delayed effective date) accomplish essentially the same purpose and therefore should be viewed as replacing it. However, some aspects of the detrimental reliance concept have been retained (see the discussion of § 177.21 below).

3. Except in the case of § 177.22 (established and uniform practice) where the regulatory text is directly based on 19 U.S.C. 1315(d), it is proposed to remove all references to "uniform practice" or "practice" from the Part 177 texts, because the statutory and regulatory modification/revocation standards and the proposed regulatory provisions regarding third party reliance have rendered these provisions redundant or otherwise unnecessary.

4. It is proposed to eliminate the provision regarding inconsistent Customs decisions (present § 177.12) because other procedures (including the proposed modification/revocation and internal advice procedures as set forth in this document) would accomplish much of the same purpose. Moreover, elimination of this provision will avoid any potential conflict with those statutory modification/revocation publication and effective date provisions.

5. Under the proposed Subpart B prospective transaction provisions:

a. General reference is made to prospective "advice" in order to accommodate not only binding rulings but also written advice in the form of non-binding information letters;

b. The concept of Customs-initiated prospective rulings has been clarified, and procedural safeguards have been included that provide (1) that the involved private person in most cases will be afforded a 30-day period in which to present his written views to Customs before issuance of the ruling and (2) that the ruling may not be prepared below the level of a Field National Import Specialist; and

c. The list of circumstances in which a prospective ruling will not be issued has been expanded. One of these circumstances would include a case in which the ruling requester has previously received a ruling on an identical or similar transaction and that previous ruling has been the subject of an appeal under § 177.20 or a modification or revocation under § 177.21. The purpose of this provision is to limit a ruling requester to no more than "two-bites-at-the-apple." It has been included by Customs as a matter of administrative necessity in order to set an appropriate limit to the number of times that a private party may avail himself of administrative ruling and related procedures involving the same issue.

6. Under the proposed Subpart C internal advice provisions:

a. A Customs field office will have discretion in most cases on whether to seek internal advice except where the regulatory text specifically mandates, or specifically precludes, use of the procedure. Thus, as a general rule, an importer or other interested person will not have an absolute right to initiate the internal advice procedure;

b. Similar to the approach that has been used for applications for further review of protests under Part 174 of the Customs Regulations (19 CFR Part 174), one of several specific criteria would have to be met in order to request internal advice;

c. Similar to the approach followed for the issuance of prospective rulings under Subpart B, the proposed text sets forth specific circum-

stances in which internal advice may not be requested, including where the interested person has already received a prospective ruling on the same issue (the two-bites-at-the-apple limitation would apply, and thus either an appeal of the ruling under Subpart B or the allowing of an application for further review of a protest under Part 174 would constitute the permissible second bite); and

d. As in the case of Customs-initiated prospective rulings under Subpart B, the importer or other interested person will have an opportunity to present his written views to Customs before issuance of the internal advice decision, even when the internal advice procedure is initiated within Customs rather than at the request of the interested person.

7. Under the proposed Subpart D confidential treatment provisions:

a. A failure to request confidential treatment at the time the information is submitted to Customs will constitute a waiver of confidential treatment of that information, and no request for confidential treatment will be entertained by Customs if the information covered by the request was previously submitted to Customs without a request for confidential treatment;

b. A request for confidential treatment may cover any information submitted to Customs under Subpart B or Subpart C, including information submitted with an appeal or in connection with a Customs-initiated ruling or in connection with a request for internal advice initiated by Customs;

c. In the case of an appeal of a ruling or when a ruling or an internal advice request is initiated by an importer or other interested person, a failure of Customs and the submitting person to reach agreement on a request for confidential treatment either will cause Customs to close the case file without action (that is, without issuing the requested ruling or internal advice decision or appeal decision) or, if the information at issue is contained in a further submission, will cause Customs to proceed with the ruling or internal advice decision or appeal decision without considering the further submission. In either case the appeal or the ruling or internal advice request or the further submission normally will be returned to submitting person; and

d. A grant of confidential treatment generally would be valid for a period of 3 years and may be renewed for additional periods of up to 3 years each.

#### SECTION-BY-SECTION DISCUSSION OF PROPOSED CHANGES

##### **Subpart A (General Provisions)**

###### *Section 177.1*

This section provides a general overview of Part 177, in question-and-answer (Q&A) format, and includes the terms of present § 177.0 (scope) and present § 177.1(a)-(c) regarding general ruling practice, a general description of the structure and content of the Part, and more specific details regarding the operation of the prospective advice and internal advice programs under Subparts B and C.

The Q&A format was chosen in order to make the provisions more accessible and understandable to the average reader, in particular for purposes of alerting the prospective reader up front as to what benefits Part 177 may offer, without requiring the reader to read through all of the considerable technical detail that of necessity must be contained in the Part. The information provided in this Q&A format is intended to complement, and not replace, the more detailed corresponding proposed regulatory provisions set forth later in the Part. Accordingly, each reader is ultimately responsible for consulting the specific, detailed provision in question and therefore should not place sole reliance on a statement made in the Q&A text.

### *Section 177.2*

This definitions section replaces present § 177.1(d) and applies only for purposes of Subparts A through D (the country-of-origin Government procurement provisions in redesignated Subpart E include a separate definitions section).

This section includes new definitions of "National Commodity Specialist Division" and "person." These new definitions are self-explanatory.

The following changes are proposed for the definitions contained in present § 177.1(d):

1. The definition of "authorized agent" has been modified to specify only attorneys at law, licensed customs brokers, and any other persons who are not representing a principal under Part 177 in regard to a matter that constitutes "customs business" as defined in 19 U.S.C. 1641(a)(2). Customs has reexamined the statutory definition of "customs business" and has concluded that requesting rulings and making representations under Part 177 will, in the great majority of cases, involve matters that fall within the definition of "customs business" and that should be left to those classes of persons who are specially qualified (for attorneys by virtue of admission to the bar and for customs brokers by virtue of being licensed to transact customs business pursuant to 19 U.S.C. 1641 and 19 CFR Part 111) to make those requests and representations. The third class of authorized agent mentioned in the proposed text recognizes, however, that there are some matters that arise under Part 177 that do not constitute "customs business" and therefore should not be so restricted (for example, issues involving marine transactions or transportation of merchandise in bond—see 19 CFR 111.2(a)(2)(iii) and (iv)).

2. The definition of "Customs transaction" has been modified to more clearly distinguish between the three types of Customs transactions and to ensure that a "current" or a "completed" Customs transaction is not interpreted to include the filing of a ruling request under Part 177.

3. The definition of "ruling" has been modified:

- a. To include a reference to issuance by the National Commodity Specialist Division which is an organizational part of the Office of Regula-

tions and Rulings but is physically separate from the Headquarters Office;

b. To refer to issuance under Subpart B and Subpart C to reflect the move of the internal advice procedure provisions to Subpart C; and

c. To refer to the fact that a ruling may be issued in the absence of a specific request (Customs-initiated ruling).

### **Subpart B (Advice on Prospective Transactions)**

#### *Section 177.11*

This section concerns the preparation and submission of ruling requests involving prospective Customs transactions and replaces present § 177.2. The following points are noted regarding the changes reflected in the proposed new text:

1. In paragraph (a):

a. Specific provision is made for submission of the request in the English language, because Customs does not have the resources needed to translate requests prepared in other languages; and

b. For purposes of submitting a ruling request to Customs, a clearer and more specific subject matter jurisdictional division between the National Commodity Specialist Division and the Headquarters Office has been provided.

2. In paragraph (b) which concerns the content of ruling requests:

a. Statements have been added to remind the reader that a ruling is issued on the facts presented and that a ruling based on inaccurate or incomplete information will not be applied to the transaction for which it was intended;

b. The requirement to identify the port where the prospective transaction will take place has been removed, because it is unnecessarily burdensome and has minimal legal relevance or utility;

c. The specifications for the description of specific types of transactions for which rulings may be requested have been updated and otherwise revised, and specifications for additional types of transactions have been included, in order to provide more effective and precise guidance for the potential ruling requester;

d. The paragraph concerning samples submitted in connection with a ruling request has been modified to provide that samples will be returned only at the expense of the ruling requester and to provide that samples not returned or retained by Customs or consumed during examination will be disposed of according to law 90 days after disposition of the ruling request;

e. The paragraph requiring a statement concerning the existence of prior or current transactions has been revised to require submission of the statement in the form of a signed certification;

f. The paragraph regarding privileged or confidential information has been revised to provide that the ruling requester who wants confidential treatment of information must make a written request for that treatment when the information is submitted to Customs and in conformity with the provisions of Subpart D; and

g. A new paragraph has been added to require inclusion of a statement in the ruling request if the ruling requester wants to have a conference when issuance of an adverse ruling is contemplated.

3. Present paragraph (d), which concerns requests for immediate consideration, has been transferred, with textual changes, to new § 177.17 because it appears to relate more directly to the rulings issuance process. Of course, there is nothing that would preclude a ruling requester from including a request for expedited consideration in his ruling request, and Customs would consider it in accordance with the principles stated in new § 177.17.

#### *Section 177.12*

This section concerns nonconforming requests for rulings and replaces present § 177.3. The only changes of note involve (1) providing for closing the Customs file in the case of a nonconforming request sent to the Headquarters Office that is not brought into conformity within the prescribed period, (2) providing for the immediate return of the request to the requester and closing of the file without further action in the case of a nonconforming request sent to the National Commodity Specialist Division but without prejudice to resubmission, and (3) inclusion of a statement that if a ruling request is sent to the wrong office, there will be a delay in processing the request while it is forwarded to the correct office (but the request would not be treated as a nonconforming request under the section).

#### *Section 177.13*

This section concerns conferences on issues raised in ruling requests and replaces present § 177.4. The following points are noted regarding changes reflected in the proposed new text:

1. Conferences may be held only at the Headquarters Office and only in connection with rulings to be issued by that office. If a request for a conference (see proposed § 177.11(b)(9)) is made in a ruling request submitted to the National Commodity Specialist Division and an adverse ruling is contemplated and the matter cannot be resolved informally by the ruling requester and that office, the ruling request will be forwarded to the Headquarters Office for processing (forwarding to the Headquarters Office is simply intended to preserve the ruling requester's right to have a conference in the described circumstances).

2. Although a ruling requester will retain the right to have a conference if requested and provided that an adverse ruling is contemplated, under the revised text a conference also may be held whenever the Headquarters Office believes that a conference is necessary.

3. The paragraph regarding representation has been modified to clarify that while there is no restriction regarding who may accompany a ruling requester at a conference, only an "authorized agent" may appear at the conference in place of the ruling requester.

4. If additional information is to be provided after a conference, the new text prescribes a 30-day period (or longer period as may be specified by the Headquarters Office) for submission of that information.

*Section 177.14*

This section concerns changes in the status of transactions (in particular when a prospective transaction described in a ruling request becomes a current transaction or when the ruling requester learns that a summons involving the same issue has been filed in the Court of International Trade) and replaces present § 177.5. The text has been simplified to specify two basic circumstances in which a person must advise Customs of a change and the possible consequences for failing to do so.

*Section 177.15*

This section concerns the withdrawal of ruling requests and replaces present § 177.6. The text has been modified (1) to require that the withdrawal be in writing, (2) to refer to an exception under the new Subpart D texts to the normal rule that Customs will retain the ruling request and related materials in its file after a withdrawal, and (3) to more clearly state that Customs may issue a ruling on the matter on its own initiative notwithstanding the withdrawal if it is believed necessary for the sound administration of the Customs and related laws.

*Section 177.16*

This section specifies situations in which a ruling will not be issued and replaces present § 177.7. The list of situations has been significantly expanded and includes, among other things, the two-bites-at-the-apple principle discussed above in the overview of the changes to the prospective ruling provisions.

*Section 177.17*

This section concerns the issuance of rulings and replaces those portions of present § 177.8 that specifically concern the issuance process. Paragraph (a) covers the issuance of rulings in response to requests and includes, in paragraph (a)(3), a simplified text taken from present § 177.2(d) regarding the handling of requests for immediate consideration. It should also be noted that the provision in paragraph (a)(2) for issuance of ruling request responses by the National Commodity Specialist Division within 30 days is not intended to be mandatory because in some cases a longer period may be necessary. Paragraph (b) deals with the issuance of Customs-initiated rulings (as already discussed above in the overview of the changes to the prospective ruling provisions). It should be noted that an exception to the 30-day written submission period will apply to Customs-initiated rulings involving admissibility issues, because admissibility issues often involve time-sensitive enforcement considerations requiring immediate action on the part of Customs.

*Section 177.18*

This section sets forth the requirement of recipients to bring prospective rulings to the attention of Customs field offices and to use positions set forth in those rulings when completing entry documentation. It in effect replaces present § 177.8(a)(2).

*Section 177.19*

This section concerns the effect of prospective rulings and in effect replaces present § 177.9(a)-(c).

*Section 177.20*

This section sets forth procedures regarding the appeal of adverse prospective rulings issued under Subpart B. This section is entirely new and implements the terms of 19 U.S.C. 1625(b) as added by section 623 of the Mod Act. The following points are noted regarding the proposed text which is otherwise self-explanatory:

1. Although the statute refers to the appeal of an adverse "interpretive" ruling, the proposed text refers to "prospective" rulings to ensure coverage of all rulings issued under Subpart B.
2. Although the proposed text makes provision for conferences at the Headquarters Office, it differs from the initial prospective ruling procedure by providing for conferences not as a matter of right but rather only if the Headquarters Office believes that a conference is necessary.
3. An appeal under this section would constitute a second bite under the two-bites-at-the-apple principle discussed above.
4. With regard to rulings that are modified or revoked on appeal, the effective date provisions in paragraph (g)(4) of the proposed text must reflect a distinction between rulings that have been in effect for less than 60 days and those that have been in effect for 60 or more days because, in the latter case, the publication and effective date requirements of 19 U.S.C. 1625(c) and proposed new § 177.21 will control.

*Section 177.21*

This section implements the modification and revocation provisions of 19 U.S.C. 1625(c) as added by section 623 of the Mod Act and it also in effect replaces present § 177.9(d) and (e). The following points are noted regarding this proposed text:

1. The proposed text reflects a decision Customs has taken to use a prospective ruling as the means for carrying out a modification or revocation referred to in the statute or in the present regulatory text. Therefore, under the general statement in paragraph (a) of the proposed text a prospective ruling issued under Subpart B of Part 177 can (1) modify or revoke a previously issued prospective ruling, (2) modify or revoke a previously issued internal advice decision, (3) modify or revoke a holding or principle covered by a protest review decision issued previously under Part 174, or (4) have the effect of modifying or revoking the treatment previously accorded by Customs to substantially identical transactions. The following additional points are noted regarding the general content of this section:
  - a. The text reflects the statutory requirement of CUSTOMS BULLETIN publication and thus ensures that the modification or revocation procedure will be controlled by the Headquarters Office;
  - b. The text refers to the modification or revocation of a "prospective" ruling (rather than an "interpretive" ruling) because, similar to the

case of appeals under proposed § 177.20, this will ensure coverage of all rulings issued under Subpart B; and

c. The text refers to the modification or revocation of a "holding or principle covered by" a protest review decision rather than using only the term "protest review decision" that appears in 19 U.S.C. 1625. Customs notes in this regard that protests and protest review decisions arise under a separate statutory and regulatory framework (19 U.S.C. 1514 and 1515 and 19 CFR Part 174) and involve Customs decisions taken on current transactions. A previously issued protest review decision may already have resulted in an action (for example, reliquidation of an entry) that has become final and therefore is not technically susceptible to modification or revocation. On the other hand, a holding or principle reflected in a protest review decision can always be modified or revoked for purposes of applying the new position to prospective or current transactions.

Customs also notes that protests, by virtue of their separate statutory and regulatory framework, represent an exception to the rule that applies when a ruling issued under Part 177 is modified or revoked pursuant to 19 U.S.C. 1625(c), because the statutory right to file a protest cannot be infringed by an action taken by Customs under another statutory authority. Therefore, when the same issue is involved in a pending protest and in a proposed modification or revocation under 19 U.S.C. 1625(c), Customs will first conclude the 19 U.S.C. 1625(c) procedure and then issue a decision on the protest consistent with the position taken in the modifying or revoking ruling unless the protestant is entitled to a different decision due to application of any procedural delay.

2. Paragraph (b) of the proposed text concerns the procedures for modifying or revoking prospective rulings, internal advice decisions, and holdings or principles covered by protest review decisions. The following points are noted regarding this text:

a. The text reflects the statutory distinction between rulings, etc. that have been in effect for less than 60 days and those that have been in effect for 60 or more days. In the latter case the text sets forth proposed and final action CUSTOMS BULLETIN publication procedures. The modification and revocation procedures set forth in this paragraph reflect the procedures that Customs has followed under authority of the statute since the Mod Act provisions were enacted;

b. In addition to soliciting comments on the proposed modification or revocation, the notice of the proposed action invites members of the public who have received an affected ruling, etc., but who are not specifically identified in the notice, to advise Customs in writing of that fact during the prescribed 30-day comment period. The purpose of this provision is to give all affected ruling, etc. recipients an opportunity to come forward to Customs so that they would be notified in writing of the final action taken on the proposed modification or revocation. It should be noted that a failure to respond to this solicitation would have no effect on the ruling, etc. recipient's statutory and regulatory rights re-

garding the effective date of the final modification or revocation action, including his right to exercise the option of having application of the modification or revocation to his transactions commencing on the date of publication of the final notice of modification or revocation rather than only upon the close of the statutory 60-day delayed effective date period (see the discussion below regarding the paragraph (e) effective date provisions); and

c. The text makes it clear that a published final modifying or revoking notice applies to all existing rulings and decisions that involve substantially identical merchandise or issues, including rulings and decisions that are not specifically identified in that final notice.

3. Paragraph (c) of the proposed text sets forth the standards that apply to the issuance of a prospective ruling that has the effect of modifying or revoking the treatment previously accorded by Customs to substantially identical transactions. The following points are noted regarding the proposed text:

a. Paragraph (c)(1) includes a definition of the term "treatment," describes the general approach Customs will take in applying that definition to a specific situation, provides that a person may not claim as a treatment the treatment Customs accorded to transactions of another person (because treatment is personal and thus not transferable), provides that the burden of proving the existence of a treatment is on the person claiming the treatment, and prescribes standards for evidence of previous treatment. In setting forth these regulatory standards, Customs has relied in part on the text of present § 177.9(e) which concerns the use of delayed effective dates in the case of ruling letters covering transactions or issues not previously the subject of ruling letters and which have the effect of modifying the treatment previously accorded by Customs to substantially identical transactions. Customs believes that use of the present regulatory standards in this new regulatory text is appropriate because, given the similarity in language, it seems clear that the present regulation served as the model for the subsequently enacted statutory text except that application of a delayed effective date is now mandated. However, in the definition of "treatment," the proposed regulatory text differs from the present regulatory standard in providing that Customs will give "no weight" (rather than "diminished weight") to transactions that Customs for facilitation purposes processes expeditiously and without examination or import specialist review. This proposed text is intended to reflect present Customs operational reality, that is, the fact that under selectivity and bypass and related procedures Customs simply does not intervene in the vast majority of the approximately 18 million formal entries filed annually (98 percent of which are filed electronically and over 60 percent of which do not require the presentation of invoices to Customs). Customs believes that it would be inappropriate to conclude, as a legal matter, that Customs accorded treatment to a transaction in those circumstances;

b. Paragraph (c)(2)(i) describes the normal circumstance in which Customs will publish in the CUSTOMS BULLETIN a notice of intent to modify or revoke a treatment, that is, when Customs has reason to believe at the outset that the proposed prospective ruling would have that effect. In this case the regulatory text states that the notice will be published either separately or as part of a notice of a proposed modification or revocation of a ruling, etc. under paragraph (b), will solicit comments on the proposed modification or revocation, and will invite members of the public to advise Customs in writing if they have received the same treatment on substantially identical transactions (as in the case of rulings, etc., a failure to respond to the notice would not prejudice a treatment recipient's right to avail himself of the benefits of the effective date provisions under paragraph (e)). The text also provides for publication of a notice of final action on the proposed modification or revocation; and

c. Paragraph (c)(2)(ii) sets forth a second circumstance in which Customs might publish a notice of intent to modify or revoke a treatment, that is, when Customs issues a prospective ruling without being aware that it would have that effect but after issuance receives a written application from a person claiming previous treatment and requesting a delay in the effective date of the prospective ruling with respect to his transactions. In this case, if Customs agrees with the position of the person regarding the existence of the previous treatment: (1) the prospective ruling in effect would be void as regards the person who established that he had the previous treatment, and (2) Customs would continue the treatment previously accorded to that person's substantially identical transactions pending completion of the proposed modification or revocation and final action publication procedures prescribed in paragraph (c)(2)(i). The proposed text sets no time limit for submission of the written application.

Paragraph (c)(2)(ii) has been included in the section text because the statutory publication requirements regarding modification or revocation of a treatment merely require the existence of a treatment and thus do not require advance knowledge on the part of Customs regarding the existence of the treatment. This being the case, in the absence of publication of notice of a proposed modification or revocation of a ruling, etc. under paragraph (b) which would automatically solicit comments regarding existing treatments, a post-issuance mechanism must be provided whereby interested persons may inform Customs of the existence of treatments of which Customs is not otherwise aware (Customs does not keep the types of records that would enable Customs to determine routinely and independently that a treatment is being affected by a prospective ruling). As part of the general solicitation of public comments set forth in this document, Customs is interested in receiving comments on the approach proposed in this paragraph, including suggestions for any alternative approaches that commenters believe would be preferable.

4. Paragraph (d) sets forth exceptions to application of the notice requirements of paragraphs (b) and (c). The following is noted regarding the proposed text:

a. Paragraph (d)(1) sets forth a general statement and specific examples of circumstances in which Customs will not follow the paragraph (b) or paragraph (c) publication and issuance requirements. These circumstances generally involve modifications and revocations that result from governmental (legislative, judicial or administrative) decisions or other actions taken outside Customs or that result from publication procedures pursuant to other statutory authority. This paragraph has been included because it would be unreasonable, excessively burdensome, and unnecessary to require Customs to follow the paragraph (b) or paragraph (c) publication and issuance requirements with regard to matters as to which the public already has notice regarding their effect (by operation of law or otherwise) and with regard to changes that do not result from the exercise of discretionary decision-making authority on the part of Customs.

Paragraph (d)(1)(v) refers to the publication of a decision in the Federal Register as a result of a domestic interested party petition, which is a procedure that (similar to a protest) has its own statutory and regulatory framework (19 U.S.C. 1516 and 19 CFR Part 175) and that (similar to the 19 U.S.C. 1625(c) procedure) provides for public notice and comment. This paragraph was included because Customs does not believe that sound administrative practice would be well served by repeating in a 19 U.S.C. 1625(c) procedure what was already accomplished in a 19 U.S.C. 1516 context. While cases that could potentially give rise to both statutory procedures will occur only infrequently, Customs has developed the following internal approach to avoid any possible conflict between the two procedures: (1) if Customs agrees with the position presented by a domestic interested party under 19 U.S.C. 1516, Customs will then attempt to determine whether there is an extant ruling, internal advice decision, protest review decision or treatment that is in conflict with that position and, if it is determined that a conflict exists, then Customs will initiate the 19 U.S.C. 1625(c) modification or revocation procedure; or (2) if the position of Customs differs from the position of the domestic interested party and that party contests the Customs position, the matter will be resolved in accordance with the 19 U.S.C. 1516 publication procedures. As part of the general solicitation of public comments contained in this document, Customs is interested in receiving comments on the Customs position regarding this specific matter.

b. Paragraph (d)(2) sets forth three specific circumstances in which Customs will issue a modifying or revoking ruling but is not required to follow the paragraph (b) or paragraph (c) CUSTOMS BULLETIN publication procedure. The reference to correction of a clerical error reflects the terms of 19 U.S.C. 1625(c)(1) and the reference to rulings issued under the NAFTA regulations reflects the fact that different standards ap-

ply to the modification or revocation of advance rulings under the NAFTA.

5. Paragraph (e) prescribes rules regarding the effective dates and application of modifications and revocations under § 177.21. The following is noted regarding the proposed text:

a. Paragraph (e)(1) covers the modification or revocation of prospective rulings, internal advice decisions, and holdings or principles covered by protest review decisions that have been in effect for less than 60 days. The proposed text provides for an effective date for the modifying or revoking ruling, and for its application to transactions, commencing on the date of issuance because the statutory CUSTOMS BULLETIN publication and delayed effective date provisions do not apply in this case;

b. Paragraph (e)(2) covers the modification or revocation of prospective rulings, internal advice decisions, and holdings or principles covered by protest review decisions that have been in effect for 60 or more days. The proposed text provides that the modifying or revoking notice will be effective 60 days after publication of the final modifying or revoking notice in the CUSTOMS BULLETIN, in keeping with the statutory delayed effective date provision which applies in this case. With regard to the application of the modifying or revoking notice to transactions, the proposed text states that it will apply to merchandise entered, or withdrawn from warehouse for consumption, and provided that liquidation of the entry in question has not become final, as follows: (1) sixty days after publication of the final modifying or revoking notice in the CUSTOMS BULLETIN; or (2) at the option of the person whose goods are in question, commencing on the date of publication of the final modifying or revoking notice in the CUSTOMS BULLETIN.

This proposal for alternatives in applying the modification or revocation to transactions is not specifically addressed in the delayed effective date language of the statute. However, Customs believes that Congress intended to protect importers and other persons who deal directly with Customs from the effect of unilateral decisions taken by Customs without prior notice. Thus, Customs believes that the proposal could have the following results: (1) It would allow the importer or other interested party to obtain a result earlier if the result reflected in the modifying or revoking notice is favorable to his position; (2) it would afford Customs more flexibility to apply the correct legal position at an earlier date (provided the importer or other interested person requests it); (3) it would reduce the need to resort to other administrative remedies (such as filing protests and applications for further review) at a later date; (4) by leaving the choice to the importer or other interested party who is always the best judge of what is in his interest, it would preserve the basic purpose behind the statutory delayed effective date provision; and (5) it is consistent with the principle that underlies the statutory obligation of an importer to exercise reasonable care when entering merchandise; and

c. Paragraph (e)(3) covers the modification or revocation of treatment previously accorded to substantially identical transactions. Because the statutory CUSTOMS BULLETIN publication and delayed effective date provisions apply in this case, this paragraph follows the general approach taken in paragraph (e)(2) regarding the effective date of the modification or revocation and its application to transactions, but the text in regard to advancing the date of application refers to "a person who makes a valid claim regarding previous treatment." The additional observations regarding paragraph (e)(2) therefore also apply to this paragraph.

As part of the general solicitation of public comments set forth in this document, Customs would be interested in receiving specific comments regarding the suitability of the proposal in paragraphs (e)(2) and (e)(3) of this section to allow alternatives in applying a final modifying or revoking notice to transactions.

#### *Section 177.22*

This section concerns changes in established and uniform practices under 19 U.S.C. 1315(d) that result in a higher rate of duty or charge and is in part derived from present § 177.10(c). The following points are noted regarding the proposed new text:

1. Paragraph (a) sets forth traditional administrative and judicial principles regarding the meaning of an established and uniform practice and clarifies that the burden is on the importer to prove the existence of the practice except when Customs publishes a notice of a practice on its own initiative under paragraph (c). Similar to the approach taken in the definition of "treatment" in proposed § 177.21(c)(1) as discussed above, this paragraph (a) text provides that "treatment accorded by Customs" means an actual review of entries and does not include cases where Customs had no direct, active involvement in the liquidation of the entry.

2. Paragraph (b) concerns the procedures applicable to changes in established and uniform practices and is based both on the statute and on the present regulatory text.

3. Paragraph (c) concerns publication of notice of the existence of an established and uniform practice by Customs on its own initiative. Once Customs publishes the notice of that practice in the CUSTOMS BULLETIN, the practice would become subject to the paragraph (b) change procedures.

#### *Section 177.23*

This section sets forth specific procedures for the limitation of court decisions. It implements 19 U.S.C. 1625(d) and in effect replaces present § 177.10(d). The terms of the proposed text are otherwise self-explanatory.

#### *Section 177.24*

This section concerns the availability of rulings to the public. It implements the terms of 19 U.S.C. 1625(a) and in effect replaces present

§ 177.10(a). The following points are noted regarding the proposed new text:

1. The text elaborates on the statutory language in referring to all "rulings" issued under Part 177 (rather than to only "interpretive rulings") to ensure maintenance of the broad availability of all Part 177 rulings as has been the practice of Customs since adoption of the Mod Act statutory changes.

2. Although the reference to "rulings" would cover internal advice decisions issued under proposed new Subpart C, it would not cover protest review decisions issued under Part 174 of the regulations. Customs intends to address this matter in the context of a separate Part 174 regulatory document.

3. An exception has been included for rulings already made available to the public by virtue of publication under proposed §§ 177.21, 177.22 and 177.23.

### **Subpart C (Internal Advice Procedure)**

#### *Section 177.31*

This section concerns requests for advice by Customs offices in general and is based on the general statement contained in present § 177.11(a).

#### *Section 177.32*

This section sets forth the standards that apply to requests for advice on current transactions and in effect replaces present § 177.11(b). The following points are noted regarding the proposed text:

1. Paragraph (a) concerns requests for advice in circumstances in which a prospective ruling has been issued. The text corresponds to present § 177.11(b)(1). The following is noted regarding this proposed paragraph (a) text:

- a. In cases involving requests initiated by Customs, the text provides that the importer or other interested person having an interest in the current transaction at issue will be given 30 days to make a written submission on the issue; and

- b. In cases involving requests initiated by importers or other interested persons, the text provides that, so long as the matter meets the paragraph (c) standards for internal advice, the decision to request advice is solely at the discretion of the Customs office and will be made in writing within 30 days.

2. Paragraph (b) concerns requests for advice in circumstances in which a prospective ruling has not been issued. The text corresponds to present § 177.11(b)(2). The following is noted regarding this proposed paragraph (b) text:

- a. In proposed paragraph (b)(1), the text follows proposed paragraph (a) regarding written submissions when requests are initiated by Customs and regarding the discretion of the Customs office to request advice. However, the text also contains an exception to that discretionary

authority in cases involving differences in tariff treatment as provided in proposed paragraph (b)(2); and

b. Paragraph (b)(2) mandates that a Customs office request internal advice, subject to two conditions, when it learns that two or more Customs offices are applying different tariff results to the same merchandise. The text also provides that an importer of merchandise, as a function of the exercise of reasonable care, has an obligation to inform Customs when he files his entry if he knows that a "difference" situation exists regarding his importations. This provision is intended to foster uniformity in tariff application and in effect replaces present § 177.12 in this regard.

3. Paragraph (c) sets forth criteria for internal advice and has no specific counterpart in the present § 177.11 text. The following is noted regarding this proposed paragraph (c) text:

a. Proposed paragraph (c)(1) sets forth specific circumstances in which internal advice may be requested and is modeled on the criteria for further review of protests contained in present § 174.24 but with changes to reflect an internal advice context. It should be noted that these new criteria for internal advice do not permit the mere allegation of a fact by an importer or other interested person to establish that a criterion for internal advice has been met; and

b. Proposed paragraph (c)(2) lists specific circumstances in which internal advice may not be requested and is similar to proposed § 177.16 (which specifies when a prospective ruling under Subpart B will not be issued) but with changes to reflect an internal advice context. Thus, this proposed text incorporates, among other things, the two-bites-at-the-apple principle discussed above.

4. Paragraph (d) sets forth content standards for submissions or requests made by importers and other interested persons and in effect replaces present § 177.11(b)(3). The text has been modified to align on the language used in proposed § 177.11(b) for prospective ruling requests as regards conferences, requests for confidential treatment and, if the second criterion for internal advice is used, the certification as regards pending consideration and accuracy of the information provided.

5. Paragraph (e) concerns the initial review of statements submitted by importers and other interested persons and is based on present § 177.11(b)(4).

6. Paragraph (f) sets forth procedures regarding the submission and processing of requests for internal advice. The following is noted regarding this proposed paragraph (f) text:

a. Proposed paragraph (f)(1) requires the involved Customs office to submit the internal advice request to the National Commodity Specialist Division if the request involves a matter on which the National Commodity Specialist Division is allowed to issue a prospective ruling under proposed § 177.11(a)(1). The text also specifies three specific alternative actions that the National Commodity Specialist Division may take regarding the request (that is, in specific circumstances, return it to the

requesting Customs office without decision, issue a decision to the requesting Customs office with a copy to the importer or other interested person, or forward the request to the Headquarters Office for consideration and decision) and the circumstances in which each of those actions may be taken;

b. Proposed paragraph (f)(2) requires the involved Customs office to submit the internal advice request directly to the Headquarters Office if the request involves a matter on which only the Headquarters Office may issue a prospective ruling under proposed § 177.11(a)(2). The text also specifies the manner in which the Headquarters Office will review an internal advice request and issue a decision and includes the terms of present § 177.11(b)(5) regarding circumstances in which the Headquarters Office may refuse to consider a request; and

c. Proposed paragraph (f)(3) concerns conferences on issues raised in internal advice requests and has no specific counterpart in present § 177.11. This proposed text is modeled on the conference provisions for prospective rulings set forth in proposed § 177.13.

7. Paragraph (g) concerns the effect of internal advice decisions. The following is noted regarding this proposed text:

a. Proposed paragraph (g)(1) sets forth a general statement regarding the effect and application of internal advice decisions and is derived from present § 177.11(b)(6). The proposed text differs from the present text in that it (1) does not refer only to decisions issued by the Headquarters Office (because internal advice decisions can also be issued by the National Commodity Specialist Division in some cases), (2) does not include the language regarding reconsideration of the decision (which Customs does not believe is necessary given the extent of the participation of the requesting office in the process), (3) clarifies that a decision will be applied by Customs to future transactions of the importer or other interested person involving circumstances that are substantially identical in all material respects (rather than only to the one specific current transaction that gave rise to the decision), and (4) includes exception language for cases in which a decision is subsequently modified or revoked; and

b. Proposed paragraph (g)(2) sets forth standards regarding the reliance on internal advice decisions by third parties. The text follows the approach taken in the case of prospective rulings under proposed § 177.19(c).

### *Section 177.33*

This section sets forth procedures regarding the appeal of adverse internal advice decisions. The proposed text follows the proposed § 177.20 text regarding the appeal of adverse prospective rulings but with some wording changes necessary to reflect an internal advice context. Therefore, the principles reflected in the points noted above regarding proposed § 177.20 also apply to this proposed section.

*Section 177.34*

This section concerns the availability of internal advice decisions to the public and consists of a simple cross-reference to proposed § 177.24. It thus is consistent with the mandate of 19 U.S.C. 1625(a) and replaces present § 177.11(b)(7).

**Subpart D (Disclosure of Confidential Business Information)***Section 177.41*

This section sets forth detailed standards for the treatment of requests for confidential treatment of business information submitted to Customs under Subpart B or Subpart C. In addition to the general comments regarding Subpart D made above, the following points are noted regarding the proposed text:

1. Paragraph (a) consists of a basic statement regarding (1) the position of Customs on the general availability to the public of information submitted to Customs under Part 177 and (2) the right of a submitting person to request confidential treatment of information that he does not want to be disclosed to the public.

2. Paragraph (b) prescribes the standards for submitting requests for confidential treatment. The proposed text represents an elaboration of, and therefore in effect replaces, present § 177.2(b)(7) and is self-explanatory.

3. Paragraph (c) specifies the procedures Customs will follow in handling requests for confidential treatment made under proposed paragraph (b). It has no direct counterpart in the present Part 177 texts. With regard to situations in which Customs and the requesting person cannot reach agreement on a request for confidential treatment, it should be noted that the proposed text does not provide for nonconsideration and return of a submission made in connection with a prospective ruling or internal advice request that is initiated by Customs. Rather, the text provides in this case that Customs will proceed with the prospective ruling or internal advice decision but will attempt to prepare a meaningful ruling or decision in such a way as to avoid disclosure of the information at issue. This provision was included in order to avoid a situation in which the issuance of a ruling that Customs deems to be necessary could be forestalled by an importer or other interested person simply by making a request for confidentiality. Customs believes that such a result must be avoided because it could seriously compromise the effectiveness of the Customs-initiated ruling procedure.

*Section 177.42*

This section provides for a time limitation on a grant of confidential treatment and is self-explanatory.

*Section 177.43*

This section sets forth the procedures for renewing a grant of confidential treatment and is self-explanatory.

### Section 177.44

This section specifies the procedures that Customs and private parties must follow when a request for disclosure under the Freedom of Information Act (the FOIA, 5 U.S.C. 552) is made for business information submitted to Customs under Subpart B or Subpart C of Part 177. It has no counterpart in the present Part 177 texts. The proposed text reflects the so-called "reverse FOIA" principles that apply to Federal government agencies under Exemption 4 of the FOIA and is based on the provisions regarding disclosure of business information contained in § 1.6 of the Treasury Department Regulations (31 CFR 1.6).

### Subpart E (Government Procurement; Country-of-Origin Determinations)

The only changes proposed for this subpart involve changes to section references within the texts to reflect the organizational changes and consequential renumbering of the sections within Part 177.

### COMMENTS

Before adopting these proposed regulatory amendments as a final rule, consideration will be given to any written comments timely submitted to Customs, including comments on the clarity of this proposed rule and how it may be made easier to understand. Comments submitted will be available for public inspection in accordance with the Freedom of Information Act (5 U.S.C. 552), § 1.4, Treasury Department Regulations (31 CFR 1.4), and § 103.11(b), Customs Regulations (19 CFR 103.11(b)), on regular business days between the hours of 9:00 a.m. and 4:30 p.m. at the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1300 Pennsylvania Avenue, N.W., 3rd Floor, Washington, D.C.

### REGULATORY FLEXIBILITY ACT AND EXECUTIVE ORDER 12866

Pursuant to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), it is certified that the proposed amendments, if adopted, will not have a significant economic impact on a substantial number of small entities. The administrative procedures reflected in the proposed regulatory amendments are designed to provide advance advice regarding the applicability of the Customs and related laws to planned import transactions and to assist in the proper application of those laws to current transactions, and direct involvement of the public in those administrative procedures is voluntary in nature. Accordingly, the proposed amendments are not subject to the regulatory analysis or other requirements of 5 U.S.C. 603 and 604. Furthermore, this document does not meet the criteria for a "significant regulatory action" as specified in E.O. 12866.

### PAPERWORK REDUCTION ACT

The collections of information contained in this notice of proposed rulemaking have been submitted to the Office of Management and Bud-

get (OMB) for review in accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

The collections of information in these proposed regulations are in §§ 177.11, 177.14, 177.17, 177.18, 177.20, 177.21, 177.32, 177.33, 177.41, 177.43 and 177.55. The information to be collected is required in connection with the consideration of requests for, and issuance of, rulings or other written advice from Customs regarding the application of the Customs and related laws to current or future transactions, in connection with appeals and modifications or revocations of prior Customs rulings or treatments, or in connection with the issuance of country-of-origin advisory rulings and final determinations relating to Government procurement. Failure to provide the required information may preclude issuance of the requested advice by Customs or may preclude the application of the requested relief or other action by Customs. The likely respondents are individuals and business or other for-profit institutions, including partnerships, associations, and corporations, and their authorized agents.

Estimated total annual reporting and/or recordkeeping burden: 128,000 hours.

Estimated average annual burden per respondent/recordkeeper: 10 hours.

Estimated number of respondents and/or recordkeepers: 12,200.

Estimated annual number of responses: 1.

Comments on the collection of information should be sent to the Office of Management and Budget, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, D.C. 20503. A copy should also be sent to the Regulations Branch, Office of Regulations and Rulings, U.S. Customs Service, 1300 Pennsylvania Avenue, N.W., Washington, D.C. 20229. Comments should be submitted within the time frame that comments are due regarding the substance of the proposal.

Comments are invited on: (a) Whether the collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (b) the accuracy of the agency's estimate of the information collection burden; (c) ways to enhance the quality, utility, and clarity of the information to be collected; (d) ways to minimize the information collection burden on respondents, including through the use of automated collection techniques or other forms of information technology; and (e) estimates of capital or start up costs and costs of operations, maintenance, and purchase of services to provide information.

## DRAFTING INFORMATION

The principal author of this document was Francis W. Foote, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other offices participated in its development.

## LIST OF SUBJECTS IN 19 CFR PART 177

Administrative practice and procedure, Confidential business information, Customs duties and inspection, Government procurement, Reporting and recordkeeping requirements, Rulings.

## PROPOSED AMENDMENTS TO THE REGULATIONS

For the reasons stated above, it is proposed to amend Part 177 of the Customs Regulations (19 CFR Part 177) as set forth below:

## PART 177—ADMINISTRATIVE RULINGS

1. The authority citation for part 177 is revised to read as follows:

**Authority:** 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 22, Harmonized Tariff Schedule of the United States), 1502, 1624, 1625.

- 1a. Subpart A, consisting of § 177.0, is removed.

1b. Subpart B, consisting of §§ 177.21 through 177.31, is redesignated as subpart E, consisting of §§ 177.51 through 177.61.

- 1c. New subparts A through D are added to read as follows:

## SUBPART A—GENERAL PROVISIONS

*Sec.*

177.1 Overview of the part 177 ruling and related processes.

177.2 Definitions.

## SUBPART B—ADVICE ON PROSPECTIVE TRANSACTIONS

177.11 Preparation and submission of requests for prospective rulings.

177.12 Nonconforming requests.

177.13 Conferences on issues.

177.14 Change in status of transaction.

177.15 Withdrawal of requests.

177.16 Situations in which no prospective ruling will be issued.

177.17 Issuance of prospective rulings.

177.18 Requirement to bring rulings to the attention of field offices.

177.19 Effect of prospective rulings.

177.20 Appeal of prospective rulings.

177.21 Modification or revocation of prospective rulings, internal advice decisions, protest review decisions, and previous treatment of substantially identical transactions.

177.22 Established and uniform practice.

177.23 Limitation of court decisions.

177.24 Availability of rulings to the public.

## SUBPART C—INTERNAL ADVICE PROCEDURE

177.31 Requests for advice by Customs offices in general.

177.32 Requests for advice on current transactions.

177.33 Appeal of internal advice decisions on current transactions.

177.34 Availability of internal advice decisions to the public.

## SUBPART D—DISCLOSURE OF CONFIDENTIAL BUSINESS INFORMATION

177.41 Treatment of requests for confidentiality.

177.42 Time limitation.

177.43 Renewal of confidential treatment.

177.44 Disclosure pursuant to the FOIA.

## SUBPART A—GENERAL PROVISIONS

**§ 177.1 Overview of the part 177 ruling and related processes.**

(a) *General*—(1) *What does part 177 cover?* This part covers:

(i) The issuance by Customs of written advice on future (prospective) Customs transactions and the procedures Customs will follow when limiting court decisions or when changing an established and uniform practice involving tariff treatment (subpart B of this part);

(ii) The issuance by Customs of written advice on current Customs transactions (subpart C of this part);

(iii) The treatment of requests for confidential treatment of business information submitted to Customs under subpart B or C of this part (subpart D of this part); and

(iv) The issuance of country-of-origin advisory rulings and final determinations relating to Government procurement (subpart E of this part).

(2) *What is a Customs transaction?* A Customs transaction is an importation or other action that involves the application of the Customs and related laws (see also the definition of "Customs transaction" in § 177.2).

(3) *What does part 177 not cover?* The provisions of this part do not apply to:

(i) Administrative rulings, determinations, or decisions requested or issued under procedures set forth in other parts within this chapter, including, but not limited to, those set forth in:

(A) Part 12 (relating to submissions of proof of admissibility of articles detained under section 307 of the Tariff Act of 1930 (19 U.S.C. 1307));

(B) Part 103 (relating to disclosure of information in Customs files);

(C) Part 133 (certain enforcement actions relating to intellectual property rights);

(D) Subpart C of part 152 (relating to determinations concerning the dutiable value of merchandise by Customs field officers);

(E) Part 162 (relating to the calculation of loss of revenue in penalty cases);

(F) Part 171 (relating to fines, penalties, and forfeitures);

(G) Part 172 (relating to liquidated damages);

(H) Part 174 (relating to protests);

(I) Part 175 (relating to petitions filed by American manufacturers, producers, or wholesalers pursuant to section 516 of the Tariff Act of 1930, as amended);

(J) Part 181 (relating to the North American Free Trade Agreement); and

(K) Part 191 (relating to general and specific manufacturing drawback rulings); and

(ii) Other requests for decisions of an operational, administrative, or investigative nature.

(b) *Advice on prospective transactions under subpart B of this part.*

(1) *How does Customs provide written advice on prospective transactions?* Customs provides written advice on prospective Customs transactions under subpart B of this part through the issuance of rulings (see the definition of "ruling" in § 177.2) either in response to a request made under § 177.11 or in accordance with § 177.17(b).

(2) *What is the main purpose of a prospective ruling?* A ruling issued under subpart B of this part informs the recipient of the legal consequences of a Customs transaction (for example, the tariff classification and rate of duty that apply to an article to be imported into the United States from another country) before the transaction takes place.

(3) *Does a prospective ruling have specific legal significance and effect for Customs and the recipient?* Yes. Issuance of a ruling under subpart B of this part means that Customs is legally bound by the conclusion reached in it. This guarantees that Customs will apply that result to the recipient's transaction once it becomes a current transaction by virtue of importation or other action (absent a subsequent modification or revocation or superseding legal event that has taken effect). For more information on this point, see § 177.19.

(4) *Does a prospective ruling impose any obligation on the recipient?* Yes. The ruling recipient must follow the result of the prospective ruling when entering the merchandise in question. A failure to do so could result in the assessment of a monetary penalty. For more information on this point, see § 177.18.

(5) *Who may request a prospective ruling?* A ruling regarding tariff classification may be requested under subpart B of this part by any person who is an importer of merchandise into, or an exporter of merchandise to, the United States. A ruling may be requested in a non-classification context under subpart B of this part by any person who has a direct and demonstrable interest in the question or questions presented under the Customs and related laws. An authorized agent (see the definition of "authorized agent" in § 177.2) may submit a ruling request on behalf of an importer or other interested person.

(6) *What matters may be the subject of a request for a prospective ruling?* A request for a ruling under subpart B of this part may cover any issue under the Customs and related laws that falls within the subject matter jurisdiction of the Headquarters Office or the National Commodity Specialist Division, including the following:

(i) Tariff classification under the Harmonized Tariff Schedule of the United States;

(ii) Country of origin determinations;

(iii) Country of origin marking;

(iv) Valuation;

(v) Entry procedures;

(vi) Customs brokers;

(vii) Drawback;

(viii) Duty-preference programs;

(ix) Duty-deferral programs;

(x) Transportation and conveyances; and

(xi) Intellectual property rights.

(7) *When will Customs not issue a prospective ruling?* Customs will not issue a prospective ruling in any of the circumstances described in § 177.16.

(8) *Does it matter whether the prospective ruling is issued by the Headquarters Office or by the National Commodity Specialist Division?* No. Regardless of which office issues the prospective ruling, Customs and the recipient must follow the conclusion reached in the ruling (unless it has been superseded, modified, or revoked and the supersession, modification or revocation has taken effect) and any person who is not the recipient of the prospective ruling may choose to rely on it when it is reasonable to do so. For more information on these points, see § 177.19.

(9) *Can Customs issue prospective rulings on its own initiative?* Yes. These rulings are referred to as Customs-initiated rulings and have the same legal effect as rulings issued under subpart B of this part in response to a request. For more information on Customs-initiated rulings, see § 177.17(b).

(10) *Does the recipient of a prospective ruling have any recourse under subpart B if he disagrees with the result reached in the ruling?* Yes. The recipient may appeal the prospective ruling in accordance with § 177.20.

(11) *Are prospective rulings available for review and use by the general public after issuance?* All prospective rulings are made available to the general public after issuance (see § 177.24).

(12) *Can Customs modify or revoke a prospective ruling after issuance?* Yes. The procedures for modifying or revoking prospective rulings are set forth in § 177.21. A recipient of a prospective ruling that has been modified or revoked will receive actual or constructive notice of that fact. If Customs contemplates modifying or revoking a prospective ruling more than 60 calendar days after it was issued, the recipient of that ruling will be given an opportunity to comment on the contemplated action before Customs makes a final decision. Public notice with opportunity to comment will be published in the CUSTOMS BULLETIN.

(13) *If a prospective ruling is modified or revoked, what are the consequences?* A prospective ruling that has been modified or revoked is no longer binding on Customs or the recipient and no longer has relevance for third parties and therefore should not be followed. See § 177.21 for more information on the modification or revocation of rulings.

(14) *If Customs has treated a person's transactions consistently in a certain way (for example, applied a specific tariff classification to imported merchandise) and then contemplates issuance of a prospective ruling that would change that treatment, will Customs provide the affected person with an opportunity to comment?* Yes. When Customs has reason to believe that a contemplated prospective ruling would have the effect of modifying or revoking the treatment previously accorded by Customs to substantially identical transactions, notice of the intent to

modify or revoke that treatment will be published and the affected person will have an opportunity to comment. See § 177.21 for more information on the modification or revocation of treatment previously accorded to transactions.

(15) *Will Customs issue a prospective ruling that is orally requested?*

No. Customs will not issue a prospective ruling in response to an oral request. Oral opinions or advice of Customs personnel are not binding on Customs. However, oral inquiries may be made to Customs offices regarding existing rulings, the scope of existing rulings, the types of transactions with respect to which Customs will issue rulings, the scope of the rulings which may be issued, or the procedures to be followed in submitting ruling requests, as described in this part.

(16) *Will Customs issue a ruling in response to a current transaction?*

Yes. This is referred to as the internal advice procedure. If a question arising in connection with a Customs transaction already before a Customs office (a current transaction) cannot be resolved by that office in accordance with existing principles and precedents, the Customs office may forward the question for advice under the internal advice procedure in accordance with subpart C of this part. See also paragraph (c) of this section.

(c) *Advice on current transactions under subpart C of this part.*

(1) *What is the internal advice procedure?* The internal advice procedure under subpart C of this part involves the issuance of advice by the National Commodity Specialist Division or by the Headquarters Office to a Customs field office regarding the application of the Customs and related laws to a specific Customs transaction that has already come before that Customs field office (a current transaction). A completed Customs transaction may not be the subject of the internal advice procedure.

(2) *How is the procedure started?* The internal advice procedure may be started by the Customs field office on its own initiative or as a result of a request for the procedure made by an importer or other interested person.

(3) *Does an importer or other interested person have a right to the internal advice procedure?* No. While an importer or other interested person may request that a Customs field office seek internal advice, submission of the internal advice request is generally at the discretion of the Customs field office. However, there are some circumstances in which internal advice must be requested and some circumstances in which internal advice may not be requested. In addition, the procedure regarding further review of protests may be available. For more information on the standards for requesting internal advice, see § 177.32(a)-(c). For more information on the procedures for the further review of protests, see part 174 of this chapter.

(4) *Does an importer or other interested person have an opportunity to participate in the procedure?* Yes. An importer or other interested person who requests the internal advice procedure is required to present

his views on the matter at issue in his written request (see § 177.32(d)). If the Customs field office starts the procedure on its own initiative, the importer or other interested person will be given an opportunity to present its written views on the matter. In addition, the importer or other interested person may ask for a conference with Customs to discuss the matter (see § 177.32(f)(3)).

(5) *How is the internal advice decision issued?* The internal advice decision is issued in writing to the Customs field office, and a copy of the decision is provided to the importer or other interested person at that time.

(6) *Does the importer or other interested person have any recourse under subpart C of this part if he disagrees with the result reached in the internal advice decision?* Yes. The recipient may appeal the decision in accordance with § 177.33.

(7) *What is the legal effect of an internal advice decision?* As in the case of a prospective ruling issued under subpart B of this part, an internal advice decision issued under subpart C of this part represents the official position of Customs regarding the transaction described in it. For more information on this point, see § 177.32(g)(1).

(8) *Are internal advice decisions available for review and use by the general public after issuance?* Internal advice decisions issued under subpart C of this part constitute rulings as that term is defined for purposes of that subpart. Accordingly, as in the case of prospective rulings issued under subpart B of this part, internal advice decisions are made available to the general public after issuance (see § 177.34).

(9) *What utility does an internal advice decision have for a person other than the importer or other interested person?* A person may rely on an internal advice decision issued on a current transaction of another person. For more information on this point, see § 177.32(g)(2).

(10) *Are there circumstances in which an internal advice decision should no longer be followed?* Yes. The modification and revocation procedures and requirements that apply to prospective rulings issued under subpart B of this part are also applicable to internal advice decisions issued under subpart C of this part. Accordingly, an internal advice decision that has been modified or revoked by operation of law or by a prospective ruling issued under § 177.21 no longer represents the official position of Customs and therefore should not be followed by the Customs field office or by the importer or other interested person or by third parties. See § 177.21 for more information on the modification or revocation of internal advice decisions.

## § 177.2 Definitions.

For purposes of subparts A through D of this part:

(a) An "authorized agent" is a person expressly authorized by a principal to act on his behalf and may be an attorney at law, a licensed customs broker (see part 111 of this chapter), or any person who is not an attorney at law or a licensed customs broker provided that the matter on which the person represents his principal under this part does not

constitute "customs business" as defined in 19 U.S.C. 1641(a)(2). A ruling request submitted by an authorized agent must include a statement describing the authority under which the request is made. Any person appearing before Customs as an authorized agent in connection with a ruling request may be required to present evidence of his authority to represent the principal.

(b) The term "Customs and related laws" includes any provision of the Tariff Act of 1930, as amended (including the Harmonized Tariff Schedule of the United States), or the Customs Regulations, or any provision contained in other laws (including the navigation laws), regulations, treaties, orders, proclamations, or other agreements administered by Customs.

(c) A "Customs transaction" is an act or activity to which the Customs and related laws apply. There are three basic types of Customs transactions:

(1) A "prospective" Customs transaction is one that has not resulted in any arrival or in the filing of any entry or other document or in any other act to bring the transaction, or any part of it, under the jurisdiction of any Customs office;

(2) A "current" Customs transaction is one in which there has been an arrival or the filing of an entry or other document or any other act which brings the transaction, or any part of it, under the jurisdiction of any Customs office, other than the filing of a ruling request under this part or the filing of a request for other administrative action under a provision set forth elsewhere in this chapter; and

(3) A "completed" Customs transaction is one, other than a ruling issued under this part, which has been acted upon by a Customs office and with respect to which that office has issued a determination which is final in nature, but is (or was) subject to appeal, petition, protest, or other review, as provided in the applicable Customs and related laws and regulations.

(d) The term "Headquarters Office" means the Office of Regulations and Rulings located at Headquarters, United States Customs Service, Washington, DC.

(e) An "information letter" is a written statement issued by the Headquarters Office that does no more than call attention to a well-established interpretation or principle of the Customs and related laws, without applying it to a specific set of facts. If Customs believes that general information may be of some benefit to the person making the request, an information letter may be issued in response to a request for a ruling when:

(1) The request suggests that general information, rather than a ruling, is actually being sought;

(2) The request is incomplete or otherwise fails to meet the requirements for a ruling set forth in this part; or

(3) The ruling requested cannot be issued for any other reason.

(f) The "National Commodity Specialist Division" is a Customs office located in the port of New York that is an organizational part of the Customs Office of Regulations and Rulings and that includes among its functions the issuance of prospective rulings and internal advice decisions under this part.

(g) A "person" includes an individual, corporation, partnership, association, or other entity or group.

(h) A "ruling" is a written statement issued by the Headquarters Office or by the Customs National Commodity Specialist Division or by the appropriate field office of Customs as provided in subpart B or subpart C of this part that sets forth the official position of Customs on the interpretation and application of the provisions of the Customs and related laws under a specific set of facts. A ruling may be issued in response to a specific request and be set forth in a letter addressed to the person making the request or his authorized agent. A ruling also may be issued in the form of a letter to a Customs field office or person in the absence of a specific request. Rulings provided for under subpart B of this part are generally prospective in nature. Rulings provided for under subpart C of this part generally relate to current transactions and consist of internal advice decisions issued to Customs offices.

#### SUBPART B—ADVICE ON PROSPECTIVE TRANSACTIONS

### **§ 177.11 Preparation and submission of requests for prospective rulings.**

(a) *Form and address.* A request for a ruling on a prospective Customs transaction should be in the form of a signed letter written in the English language. Requests for prospective rulings must be submitted as follows:

(1) *To the National Commodity Specialist Division.* A request for a ruling involving a matter identified in paragraph (b)(3)(ii) or paragraph (b)(3)(iii) of this section, other than country of origin determinations involving duty-preference programs under General Notes 3(a)(iv) and 4 through 11, Harmonized Tariff Schedule of the United States (HTSUS), must be submitted to the Director, National Commodity Specialist Division, Office of Regulations and Rulings, United States Customs Service, 6 World Trade Center, New York, New York 10048; and

(2) *To the Headquarters Office.* A request for a ruling on country of origin involving duty-preference programs under General Notes 3(a)(iv) and 4 through 11, HTSUS, or on any matter identified in paragraphs (b)(3)(iv) through (b)(3)(vii) of this section, must be submitted to the Office of Regulations and Rulings, United States Customs Service, Washington, DC 20229.

(b) *Content—(1) General.* Each request for a ruling on a prospective Customs transaction must contain a complete statement of all facts and other information relating to the transaction. A ruling is issued on the basis of the facts presented to Customs. If an issued ruling was based on inaccurate or incomplete information regarding a material fact, it will not be applied to the transaction for which it was intended.

(2) *Names and addresses.* The ruling request must specify the names, addresses, and other appropriate identifying information of all interested parties.

(3) *Description of transaction*—(i) *General.* The Customs transaction to which the ruling request relates must be described in sufficient detail with all material and relevant facts to permit the proper interpretation and application of relevant Customs and related laws.

(ii) *Tariff classification rulings.* If the transaction involves the importation of an article for which a ruling is requested as to its proper classification under the provisions of the Harmonized Tariff Schedule of the United States, including special program provisions or other provisions under Chapter 98 or Chapter 99, the ruling request should include a full and complete description of the article, including the country of origin of the article and any of its components, if known, and any applicable descriptive details required to be included on an invoice for such article under § 141.89 of this chapter, a description of the manufacturing processes used to produce the article and the countries in which those processes took place, and information as to the article's principal use in the United States, its commercial, common, or technical designation, and, where the article is composed of two or more materials, the relative quantity (by weight and by volume) and value of each. The ruling request should also note, whenever germane, the purchase price of the article, and its approximate selling price in the United States. Individual requests for rulings may involve a maximum of five (5) merchandise items, all of which must be of the same class or kind.

(iii) *Country of origin and marking rulings*—(A) *Country of origin.* If the ruling request involves a determination of the country of origin of an article that incorporates processing operations and/or constituent materials attributable to more than one country (including the United States), the ruling request should include a full and complete description of:

(1) The article and/or material prior to the processing in each country, including its tariff classification, if known;

(2) Each processing operation performed in each country, the type of machinery used, and the time expended during the processing; and

(3) The article after the processing in each country, including its tariff classification, if known.

(B) *Marking issues not involving origin*—(1) *Manner of marking.* If the ruling request involves a determination of the acceptability of a manner of marking (for example, whether a proposed marking is sufficiently conspicuous or permanent), a sample of the article is generally required. However, if a sample is not available, a ruling will be issued on a submitted photograph if the photograph adequately demonstrates the proposed marking.

(2) *Request for marking exception.* If the ruling request involves the application of one or more exceptions from marking, all facts regarding the requested exception must be furnished. For example, a request in-

volving a proposal to mark a container rather than the article contained therein should include: a complete description of the article and the container; a statement indicating whether or not the article will be re-packed after importation; and a statement of how the article is to be used and to whom it is to be sold.

(iv) *Valuation rulings*—(A) *Required information*. Each request for a ruling on the proper method of valuation or on any other issue relating to the appraised value of imported merchandise under 19 U.S.C. 1401a should contain the following:

(1) A narrative description of the import transaction;

(2) A brief description of the imported merchandise;

(3) The names of all parties involved in any sale or sales of the imported merchandise, including the manufacturer, the seller (if different from the manufacturer), the purchaser, the importer, the consignee, and any intermediaries (for example, middlemen acting as buying agents, selling agents, or sellers), or, if the imported merchandise is not sold, a detailed description of the circumstances surrounding the import transaction and the parties involved;

(4) A detailed description of the roles of the various parties, including the intermediaries;

(5) A description of the relationship, if any, of the various parties;

(6) If a sale is involved, the terms of sale, the purchase price, and the method of payment;

(7) How, when, and where the merchandise will be shipped and the place from which it will be shipped (to the extent known, the expected movement of the merchandise from the place of manufacture to its ultimate destination in the United States should be described);

(8) A statement regarding whether or not any additional payments are made by the buyer to the seller or to a party related to the seller over and above the purchase price (and if so, a description of what each such payment is for);

(9) A statement regarding whether or not any assists, as described in subpart E of part 152 of this chapter, were furnished;

(10) If there is more than one sale of the imported merchandise, the details concerning each sale;

(11) If the person requesting the ruling does not have any relevant information specified in this paragraph (b)(3)(iv)(A), a statement identifying that missing information: and

(12) Any additional information that is relevant to the particular issue presented (the provisions of subpart E of part 152 of this chapter should be consulted in order to determine what additional information might be relevant).

(B) *Documentary evidence*. Each request for a ruling on the proper method of valuation or on any other issue relating to the appraised value of imported merchandise under 19 U.S.C. 1401a should include copies of all relevant documents pertaining to the issue presented, including purchase orders, sales contracts, invoices, bills of lading, buy-

ing agency agreements, and royalty agreements (a ruling request involving the dutiability of royalty payments must include copies of any written royalty agreement pertaining to the payment of such royalties and any written supply agreement pertaining to the sale of the imported merchandise).

(v) *Rulings on entry procedures, Customs brokers, drawback, and duty-deferral programs*—(A) *Required information*. Each request for a ruling on entry procedures, issues concerning Customs brokers, drawback (other than applications for rulings under §§ 191.7 and 191.8 of this chapter), and duty-deferral programs (foreign trade zones, temporary importations under bond, and Customs bonded warehouses, including duty-free sales enterprises) should include the following:

(1) A complete statement of the specific statutory and regulatory provisions believed to be at issue, if known;

(2) Citations to the specific judicial and administrative decisions believed to address the issue involved in the transaction;

(3) A complete description of the transaction. The Customs ports at which the transaction is to occur should be identified. The anticipated time when the transaction will take place also should be stated;

(4) If the issue involves a transfer of merchandise, then each transfer must be described completely and each party to the transfer must be identified;

(5) If the issue involves the adequacy of records, those records must be described in detail, with particular emphasis on describing how the subject merchandise will be recorded and identifying the recordkeeper and where the records will be stored. If the records involve codes, the codes must be defined;

(6) If the ruling request involves information that is intended to be filed with Customs when the transaction occurs, the request must state whether the information is to be filed in documentary form or electronically;

(7) If the issue involves merchandise in a foreign trade zone, the intended zone status of the merchandise must be stated;

(8) If the issue involves the processing of merchandise, a complete description of the processing and of the merchandise at the start and end of the processing must be provided. The ruling request must describe how the merchandise at the end of the process differs in name, use, or characteristics from the merchandise at the start of the process. If the processing involves a chemical reaction or a mixture of chemicals, the chemical formulas must be provided; and

(9) If the issue involves commercial interchangeability of imported merchandise and merchandise to be substituted for that merchandise under 19 U.S.C. 1313(j)(2), the ruling request must include information on published governmental or industry standards, tariff classification, part numbers, and value for both the imported merchandise and the substituted merchandise. The request must include information as to

whether, and if so how, these criteria are used as terms of sale or purchase of the merchandise.

(B) *Documentary evidence.* Each request for a ruling on entry procedures, issues concerning Customs brokers, drawback, and duty-deferral programs must include documentary evidence which illustrates the information required under paragraph (b)(3)(v)(A) of this section. For example:

(1) If the issue involves the sale or purchase of merchandise, documentary evidence would include a complete representative sample of the documents covering the sale or purchase;

(2) If the issue involves inventory procedures, documentary evidence would include a complete representative sample of the inventory records involved;

(3) If the issue involves the processing of merchandise, documentary evidence would include photographs or drawings of the merchandise at each stage of the process and may include flow charts, if appropriate; and

(4) If the issue involves the delivery of merchandise from a duty-free sales enterprise, documentary evidence would include a map or drawing to scale of the store location with respect to the international border and photographs showing the representative amount of traffic during business hours.

(vi) *Rulings on transportation and conveyances—(A) Required information.* Each request for a ruling involving transportation and conveyance issues should include the following:

(1) A complete statement of the specific statutory and regulatory provisions believed to be at issue;

(2) Citations to the specific judicial and administrative decisions believed to address the issue involved in the transaction;

(3) A complete description of the transaction. The Customs ports at which, or nearest to which, the transaction is to occur should be identified. The anticipated time when the transaction will take place also should be stated;

(4) If the issue involves a vessel, the ruling request must identify the vessel, its country of build, flag, and, if a vessel of the United States, any endorsements on the vessel's documentation;

(5) If the issue involves vessel or air cabotage, a complete itinerary must be provided (that is, the ruling request must describe the location of all points in any movement involved, as well as any activity which would occur at each point). If the issue involves passengers, there must be a general description of the types of passengers involved and of their relationship to the conveyance. If the issue involves merchandise, the merchandise must be described;

(6) If the issue involves a vehicle, the ruling request must identify the vehicle owner's principal base of operations;

(7) If the issue involves fisheries, the ruling request must identify all activities, locations, and species of fish involved; and

(8) If the issue involves instruments of international traffic, the ruling request must state the numbers of instruments that are expected to be used and must describe the instrument in detail, including how the instrument is suitable for, and capable of, reuse.

(B) *Documentary evidence.* Each request for a ruling on transportation and conveyance issues must include documentary evidence which illustrates the information required under paragraph (b)(3)(vi)(A) of this section. If the issue involves the movement of a conveyance, documentary evidence would include maps showing the movement. If the issue involves an instrument of international traffic, documentary evidence would include photographs or drawings of the instrument.

(vii) *Rulings related to intellectual property rights—(A) General.* If the transaction involves the importation of an article or articles for which a ruling is requested as to whether the proposed importation would infringe on a registered trademark or copyright or a recorded trade name, the ruling request should include a full and complete description of the article and a sample together with a description of the transaction to which the ruling request relates.

(B) *Gray market goods.* If the transaction involves the importation of a gray market article (as defined in § 133.23(a) of this chapter), in addition to the information specified in paragraph (b)(3)(vii)(A) of this section, the ruling request should include the country of origin of the article(s), the name(s) of the manufacturer(s), and, if known, a statement as to whether the trademark is owned outside of the United States by the U.S. trademark owner or by a parent, subsidiary, or other party otherwise subject to common ownership or control with the U.S. owner.

(4) *Samples.* Each request for a ruling regarding the status of an article under any Customs or related law affecting the importation or arrival of that article should be accompanied by photographs, drawings, or other pictorial representations of the article and, whenever possible, by a sample article, unless a precise description of the article is not essential to the ruling requested. Any article consisting of materials in chemical or physical combination for which a laboratory analysis has been prepared by or for the manufacturer should include a copy of that analysis. A sample submitted in connection with a request for a ruling becomes a part of the Customs file in the matter and will be retained until the ruling is issued or the ruling request is otherwise disposed of. If the return of the sample is desired, the ruling request should say so and should provide for a means of return that will entail no cost to Customs for packing materials and shipping fees. A sample should only be submitted with the understanding that all or a part of it may be damaged or consumed in the course of examination, testing, analysis, or other actions undertaken in connection with the ruling request. All samples not returned or retained by Customs for official government use or consumed in the course of examination, testing, or analysis will be donated to a charity, destroyed, or otherwise disposed of according to law 90 days after issuance of the ruling or other disposition of the ruling request.

(5) *Related documents.* If the question or questions presented in the ruling request directly relate to matters set forth in any invoice, contract, agreement, or other document, a copy of the document must be submitted with the request. (Original documents should not be submitted inasmuch as any documents or exhibits furnished with the ruling request become a part of the Customs file in the matter and cannot be returned except as otherwise provided in § 177.12 or § 177.41.) The relevant facts reflected in any documents submitted, and an explanation of their bearing on the question or questions presented, must be expressly set forth in the ruling request.

(6) *Prior or current transactions.* Each ruling request must contain, or provide as a signed attachment to the request, the following certification by a person having knowledge of the facts:

I certify that, to the best of my knowledge and belief, and except as otherwise stated herein, the transaction described in this ruling request, or one similar, identical, or related to it, is not currently being considered by any Customs office and will not be pending before any Customs office by virtue of a request for a prospective ruling or a request for internal advice or a protest filed simultaneously with this request and is not pending before any other Federal agency or before any Federal court, and that, to the best of my knowledge and belief, all information provided in connection with this ruling request is accurate and complete.

(7) *Statement of position.* If the ruling request asks that a particular determination or conclusion be reached in the ruling letter, a statement must be included in the request setting forth the basis for that determination or conclusion, together with a citation of all relevant supporting authority.

(8) *Confidential information.* If the person submitting a ruling request wants Customs to accord confidential treatment to any information submitted in connection with the ruling request, a written request for that confidential treatment must be made when the information is submitted to Customs and must conform to the requirements of subpart D of this part.

(9) *Conferences.* If a person submitting a ruling request wants an opportunity to have a conference if issuance of an adverse ruling is contemplated (see § 177.13), a statement to that effect must be included in the ruling request.

(c) *Signing; instructions as to reply.* The ruling request must be signed by a person entitled to make the request, as provided in § 177.1(b)(5). A ruling requested by a principal or authorized agent may direct that the ruling letter be addressed to the other.

#### **§ 177.12 Nonconforming requests.**

(a) *Notice of nonconformity.* If a ruling request does not conform to the requirements of this subpart, the person submitting the ruling request will be so notified in writing, and the requirements that have not been met will be pointed out in the notice.

(1) *Request submitted to the Headquarters Office.* In the case of a nonconforming ruling request submitted to the Headquarters Office, the person will be given 30 calendar days from the date of the notice (or such longer period as the notice may provide) to supply any additional information requested in the notice or to otherwise conform the ruling request to the requirements referred to in the notice. The file pertaining to a nonconforming ruling request submitted to the Headquarters Office will be administratively closed if the ruling request is not brought into conformity with the provisions of this part within the period of time allowed.

(2) *Request submitted to the National Commodity Specialist Division.* In the case of a ruling request made to the Director, National Commodity Specialist Division, a failure to conform to the requirements of this part will result in the immediate return of the ruling request with the notice specifying the deficiencies, and the file pertaining to the nonconforming ruling request will be closed with no further action taken on the request but without prejudice to resubmission.

(b) *Submission to the wrong office.* If a ruling request is not submitted to the proper Customs office specified in § 177.11(a), Customs will not for that reason alone treat it as a nonconforming request under this section. However, there will be a delay in processing the request while it is forwarded to the proper office.

### § 177.13 Conferences on issues.

(a) *General.* Conferences on issues presented in ruling requests under this subpart will be held only in connection with rulings to be issued by the Headquarters Office and only in circumstances in which either the Headquarters Office contemplates issuance of a ruling adverse to the ruling requester's position or the Headquarters Office for any other reason believes that a conference is necessary. Conferences are scheduled for the purpose of affording the parties an opportunity to freely and openly discuss the matters set forth in the ruling request. Accordingly, the parties will not be bound by any argument or position advocated or agreed to, expressly or by implication, during the conference unless either party subsequently agrees to be so bound in writing. The conference will not conclude with the issuance of a ruling.

(b) *National Commodity Specialist Division rulings.* If a ruling request filed with the Director, National Commodity Specialist Division, reflects a desire for a conference and it is determined after review of the issue or issues raised that the proposed ruling will be adverse to the ruling requester's position, and if the different positions cannot be resolved through telephonic or other informal discussions between the ruling requester and the National Commodity Specialist Division, the case will be referred to the Headquarters Office for processing.

(c) *Time, place, and number of conferences.* If a request for a conference is granted, the person making the request will be notified of the time and place of the conference. No more than one conference with respect to the matters set forth in a ruling request will be scheduled un-

less, in the opinion of the Headquarters Office, additional conferences are necessary.

(d) *Representation.* A person whose request for a conference has been granted may appear at the conference in person and may be accompanied by counsel or other representatives or, in lieu of a personal appearance, the person may designate an authorized agent to appear at the conference in his place.

(e) *Additional information presented at conference.* It will be the responsibility of the person submitting the ruling request to provide for inclusion in the Headquarters Office file in the matter a written record setting forth any and all additional documents, exhibits, or other information introduced during the conference to the extent that person considers the material relevant to the consideration of the ruling request. Any further documentation, exhibits, or other information to be submitted as a result of the conference must be submitted to the Headquarters Office within 30 calendar days following the conference or within any longer period as the Headquarters Office may authorize.

#### **§ 177.14 Change in status of transaction.**

Each person who submitted a ruling request in connection with a prospective Customs transaction must immediately advise in writing the Customs office in which the ruling request is pending when any transaction described in the ruling request becomes a current transaction or when the person subsequently learns that a summons has been filed in the U.S. Court of International Trade regarding the same issue as that involved in the ruling request. In addition, any person who is engaging in a current Customs transaction and who has knowledge that a ruling has been previously requested with respect to that transaction must advise the Customs field office in which the current transaction is occurring that a prospective ruling is pending concerning the matter. Failure to advise the Customs office in which the ruling request is pending or the Customs office in which the transaction is occurring may result in refusal to issue the ruling or, if a ruling was issued, revocation of the ruling.

#### **§ 177.15 Withdrawal of requests.**

Any request for a prospective ruling may be withdrawn in writing by the person submitting it at any time before the issuance of a ruling letter or any other final disposition of the request. When a withdrawal occurs and except as otherwise provided in subpart D of this part, all correspondence, documents, and exhibits submitted in connection with the ruling request will be retained in the Customs file and will not be returned. The mere withdrawal of a ruling request will not preclude Customs from issuing a ruling on its own initiative if Customs determines that it would be consistent with the sound administration of the Customs and related laws to do so (see § 177.17(b)).

**§ 177.16 Situations in which no prospective ruling will be issued.**

As a general rule, no prospective ruling will be issued under this subpart:

(a) In response to a ruling request which fails to comply with the provisions of this subpart;

(b) With regard to transactions or questions that are essentially hypothetical in nature or in any instance in which it otherwise appears contrary to the sound administration of the Customs and related laws to issue a ruling;

(c) With regard to a completed transaction;

(d) When confidentiality issues raised in a ruling request cannot be resolved (see subpart D of this part);

(e) When Customs determines that issuance of an information letter would be more appropriate;

(f) When the ruling requester has previously received a ruling involving an identical or similar transaction and:

(1) A decision on an appeal from that previous ruling has been issued under § 177.20; or

(2) A modification or revocation involving that previous ruling is pending or has been issued under § 177.21;

(g) If the issue involved is identical or similar to one that is the subject of a pending modification or revocation under § 177.21;

(h) An established and uniform practice involving an identical or similar transaction exists or is undergoing a change under § 177.22;

(i) A limitation of a court decision involving an identical or similar transaction is pending under § 177.23;

(j) A protest review decision involving an identical or similar transaction is pending under part 174 of this chapter; or

(k) If the ruling involves an issue pending before the United States Court of International Trade as a result of a summons filing or other action or which is pending before the United States Court of Appeals for the Federal Circuit or any court of appeal from that court. Litigation before any other court will not preclude the issuance of a ruling letter, provided neither the United States nor any of its agencies, officers or agents is named as a party to the action.

**§ 177.17 Issuance of prospective rulings.**

(a) *Rulings issued in response to a request*—(1) *General*. Customs will normally process requests for rulings on prospective Customs transactions in the order in which they are received and as expeditiously as possible. Additional time may be required for preparation of a ruling if a laboratory analysis of a sample is needed or if it is necessary to obtain additional information from another government agency.

(2) *Request processing by the National Commodity Specialist Division*—(i) *Issuance of rulings*. Requests for prospective rulings involving tariff classification or country of origin or marking that are submitted to the Director, National Commodity Specialist Division, in accordance

with § 177.11(a) generally will be responded to within 30 calendar days of receipt except when a referral to the Headquarters Office occurs under paragraph (a)(2)(ii) of this section.

(ii) *Referral of requests to the Headquarters Office.* If the Director, National Commodity Specialist Division, believes that the issues or arguments presented are novel or complex, the ruling request may be referred to the Headquarters Office for response. In addition, if the ruling response contemplated by Customs would be adverse to the position advocated by the ruling requester and the ruling requester has requested a conference in such a circumstance, the Director, National Commodity Specialist Division, will refer the ruling request to the Headquarters Office for response. In either case, Customs will in writing advise the person submitting the ruling request that it has been referred to the Headquarters Office.

(3) *Requests for immediate consideration.* A request that a particular matter be given consideration ahead of its regular order, if made in the ruling request or thereafter in accordance with the submission procedures set forth in § 177.11(a) and with a showing of a clear need for that treatment, will be given consideration as the particular circumstances warrant and permit. Ordinarily, no assurance can be given that a particular ruling request will be acted upon by the time requested.

(b) *Rulings initiated by Customs.* The Headquarters Office or the National Commodity Specialist Division may issue, or a Field National Import Specialist may prepare for issuance by a port director, other rulings on the initiative of Customs with respect to issues or transactions described or suggested by ruling requests submitted under the provisions of this part, or with respect to issues or transactions otherwise brought to its attention. If Customs contemplates issuance of a Customs-initiated ruling, the importer or other interested party to whom the ruling would be issued will be notified in writing and, except when the contemplated ruling involves a question of admissibility of merchandise (see § 151.16 of this chapter), will be afforded 30 calendar days to make a written submission setting forth its position on the issue involved in the contemplated ruling. If the person making the written submission wants Customs to accord confidential treatment to any information contained in the written submission, a request for that confidential treatment must be included in the written submission and must conform to the requirements of subpart D of this part. These Customs-initiated rulings will be made available to the general public as provided in § 177.24.

#### **§ 177.18 Requirement to bring rulings to the attention of field offices.**

Any person, or a successor in interest of that person, to whom a ruling has been issued under this part must abide by the following principles and procedures when engaging in a current Customs transaction that involves imported merchandise to which that ruling relates:

(a) The person must either attach a copy of the ruling to the documents filed with the appropriate Customs office in connection with the current transaction or otherwise include the ruling number in the information filed for the current transaction;

(b) Except as otherwise specifically provided elsewhere in this chapter, the person must use the position set forth by Customs in the ruling in completing any documentation in connection with any subsequent entry involving the issues addressed, and a failure to do so may result in a rejection of the entry and may result in the assessment of a monetary penalty for failure to exercise reasonable care. If the person wishes to challenge a Customs position reflected in a ruling, the appropriate course of action would be to appeal the ruling under § 177.20 or § 177.33 or to file a protest in accordance with part 174 of this chapter; and

(c) The person must immediately bring to the attention of the appropriate Customs field office a ruling received after the filing of entry documents or information. Depending on the circumstances, failure to do so may result in the imposition of such penalties as may be appropriate.

#### **§ 177.19 Effect of prospective rulings.**

(a) *General.* A prospective ruling represents the official position of Customs with respect to the particular transaction or issue described in it and is binding on Customs and the recipient until the ruling is modified or revoked as provided in § 177.21. Accordingly, so long as the ruling has not been modified or revoked (whether by Customs action or by operation of law), the principle of that ruling may be cited by the recipient of the ruling as authority in the disposition of transactions involving circumstances that are substantially identical in all material respects. Generally, a ruling is effective on the date of issuance and may be applied to all entries of merchandise which are unliquidated, or may be applied to other transactions on which Customs has not taken final action, on that date (see, however, §§ 177.21 and 177.22 regarding rulings which modify or revoke previous rulings or result in a change of an established and uniform practice). Notwithstanding the issuance of a ruling under this part, the admissibility of merchandise is determined at the time of entry or release.

(b) *Application to transactions—(1) Application of rulings in general.* Each prospective ruling is issued on the assumption that all of the information furnished in connection with it and incorporated in it, either directly, by reference, or by implication, is accurate and complete in every material respect. The application of a ruling by a Customs field office to a current transaction to which it is purported to relate is subject to the verification of the facts incorporated in that ruling, a comparison of the described transaction and the current transaction, and the satisfaction of any conditions on which the ruling was based. If, in the opinion of any Customs field office by which the current transaction is under consideration or review, the ruling does not conform to the material facts of the

current transaction or any conditions set forth in that ruling have not been satisfied, the ruling will not be applied to that current transaction. Otherwise, if the transaction described in the ruling and the current transaction are substantially identical in all material respects, and provided that any and all conditions set forth in the ruling have been satisfied, the ruling will be applied to the current transaction.

(2) *Tariff classification rulings.* Each prospective ruling setting forth the proper classification of an article under the provisions of the Harmonized Tariff Schedule of the United States will be applied not only to the prospective transaction covered by the ruling request but also to any current transactions involving either articles identical in all material respects to the sample submitted with the ruling request or articles whose description is identical in all material respects to the description set forth in the ruling.

(c) *Third party reliance on rulings.* A person engaging in a Customs transaction who has not received a ruling covering that transaction may rely on a prospective ruling issued to or on behalf of another person and made available to the public under § 177.24, and may assume that Customs will apply the principles of that ruling to his transaction, provided that Customs determines that the relevant facts and principles reflected in the ruling are materially the same as those involved in the transaction under consideration and provided that the ruling has not been modified or revoked by operation of law or by Customs action (see § 177.21). In addition, any person eligible to request a prospective ruling as provided in § 177.1(b)(5) may request under this subpart a ruling on a transaction believed to be similar to one covered by an already issued ruling.

### **§ 177.20 Appeal of prospective rulings.**

(a) *Scope of appeal.* If the recipient of a prospective ruling issued under this subpart (other than a ruling issued under § 177.21) believes that the ruling is adverse to his position on one or more substantive issues reflected in the ruling, that recipient, or his authorized agent, may pursue an administrative appeal of that ruling in accordance with the procedures set forth in this section. An appeal filed under this section must be limited to issues involving the construction of the law and will involve a *de novo* review of the ruling which is the subject of the appeal. The decision on appeal may correct an erroneous statement in the original ruling, may affirm the result reached in the original ruling, may modify or revoke the original ruling (see § 177.21), or may involve the issuance of a new ruling if new or additional facts are presented in the appeal.

(b) *Form and address.* The appeal must be in the form of a signed letter written in the English language and must be addressed to the Office of Regulations and Rulings, United States Customs Service, Washington, DC 20229. The words "Ruling Appeal" should appear in a conspicuous place on the face of the envelope containing the appeal letter.

(c) *Time of filing.* The appeal must be filed within 30 calendar days of the date of the adverse ruling. An appeal received by Customs after that 30-day appeal period will be rejected as untimely and will be returned to the person filing the appeal. The issues raised in a rejected appeal may be the subject of administrative review only under the internal advice procedure provided for in subpart C of this part or in connection with a valid protest filed under part 174 of this chapter.

(d) *Content.* Each appeal letter should include a copy of the ruling which is the subject of the appeal, must include the certification required under § 177.11(b)(6) appropriately modified to reflect an appeal context, and should include any other information, documents, samples or other materials submitted in connection with the original ruling request under § 177.11 which are not reflected in the ruling and which the person filing the appeal deems relevant to the issues raised in the appeal.

(e) *Current or completed transactions.* The filing of an appeal under this section will not result in a suspension of liquidation in the case of current transactions pending resolution of the appeal and will not extend or otherwise affect the period for filing a protest under part 174 of this chapter. However, if a person has filed a timely appeal under this section, he may protest under part 174 any liquidation that is consistent with the original ruling, and any resulting protest decision will reflect the decision on appeal under this section.

(f) *Confidential information.* If the person filing the appeal wants Customs to accord confidential treatment to any information submitted in connection with the appeal, a written request for that confidential treatment must be made when the information is submitted to Customs and must conform to the requirements of subpart D of this part.

(g) *Processing of appeals—(1) General.* Appeals of adverse rulings will normally be processed in the order they are received and as expeditiously as possible. The provisions of § 177.13 relating to conferences will apply to appeals under this section, except that a conference on an appeal under this section will not be granted as a matter of right but rather only if the Headquarters Office believes that a conference is necessary. If a conference is held, the Headquarters Office may require additional time to prepare the decision on appeal.

(2) *Requests for expedited consideration.* If a request that an appeal be given expedited consideration is made in the appeal letter with a reasonable showing of business necessity for that treatment, the appeal will be decided no later than 60 calendar days following the date on which the appeal is received by the Headquarters Office except when the publication requirements of § 177.21 are applicable (see paragraph (g)(4)(ii) of this section).

(3) *Issuance of decision.* Each appeal will be decided on the written record before Customs, that is, the record on the original appealed ruling plus the appeal letter submission and any submission made after a con-

ference pursuant to § 177.13(e) and any other information that Customs determines to be relevant. The Headquarters Office will issue a written ruling on the appeal to the person who filed the appeal or to any other person designated for that purpose in the appeal letter.

(4) *Effective dates.* If the ruling on appeal affirms the result reflected in the original ruling, that original ruling will remain in effect for purposes of this subpart. If the Headquarters Office determines on appeal that the original ruling is in error in whole or in part or is otherwise not in accord with the current views of Customs, the ruling on appeal will modify or revoke the original ruling with regard to the issue or issues raised on appeal and will be given effect as follows:

(i) If the ruling on appeal is issued less than 60 calendar days after the effective date of the original ruling, the result reflected in the ruling on appeal will be effective on the date of the original ruling and will be applied to Customs transactions as set forth in § 177.19; or

(ii) If the ruling on appeal is issued 60 or more calendar days after the effective date of the original ruling, the ruling on appeal will constitute a modifying or revoking ruling and the publication and effective date requirements set forth in § 177.21 will apply.

**§ 177.21 Modification or revocation of prospective rulings, internal advice decisions, protest review decisions, and previous treatment of substantially identical transactions.**

(a) *General.* An prospective ruling issued under this subpart or an internal advice decision issued under subpart C of this part or a holding or principle covered by a protest review decision issued under part 174 of this chapter, if found to be in error or not in accord with the current views of Customs, may be modified or revoked by a prospective ruling issued under this subpart. In addition, a prospective ruling issued under this subpart may have the effect of modifying or revoking the treatment previously accorded by Customs to substantially identical transactions. A modification or revocation under this section must be carried out in accordance with the notice procedures set forth in paragraph (b) or paragraph (c) of this section except as otherwise provided in paragraph (d) of this section, and the modification or revocation will take effect as provided in paragraph (e) of this section.

(b) *Prospective ruling, internal advice decision or protest review decision.* Customs may modify or revoke a prospective ruling or internal advice decision or holding or principle covered by a protest review decision that has been in effect for less than 60 calendar days by simply giving written notice of the modification or revocation to the person to whom the original ruling was issued or whose current transaction was the subject of the internal advice decision or, in the case of a protest review decision, to the person identified on the Customs Form 19 as the protestant or to any other person designated to receive notice of denial of a protest under § 174.30(b) of this chapter. However, when Customs contemplates the issuance of a prospective ruling that would modify or revoke a prospective ruling or internal advice decision or holding or

principle covered by a protest review decision which has been in effect for 60 or more calendar days, the following procedures will apply:

(1) *Publication of proposed action.* A notice proposing the modification or revocation and inviting public comment on the proposal will be published in the CUSTOMS BULLETIN. The notice will refer to all previously issued prospective rulings or internal advice decisions or protest review decisions that Customs has identified as being the subject of the proposed action and will invite any member of the public who has received another prospective ruling or internal advice decision or protest review decision involving the issue that is the subject of the proposed action to advise Customs of that fact. Interested parties will have 30 calendar days from the date of publication of the notice to submit written comments on the proposed modification or revocation and to advise Customs in writing that they are recipients of an affected prospective ruling or internal advice decision or protest review decision that was not identified in the notice.

(2) *Notice of final action.* In the absence of extraordinary circumstances, within 30 calendar days after the close of the public comment period, any submitted comments will be considered and a final modifying or revoking notice or notice of other appropriate final action on the proposed modification or revocation will be published in the CUSTOMS BULLETIN. In addition, a written decision will be issued to the person to whom the original prospective ruling was issued or whose current transaction was the subject of the internal advice decision or, in the case of a protest review decision, to the person identified on the Customs Form 19 as the protestant or to any other person designated to receive notice of denial of a protest under § 174.30(b) of this chapter. Publication of a final modifying or revoking notice in the CUSTOMS BULLETIN will have the effect of modifying or revoking any prospective ruling or internal advice decision or holding or principle covered by a protest review decision that involves merchandise or an issue that is substantially identical in all material respects to the merchandise or issue that is the subject of the modification or revocation, including a prospective ruling or internal advice decision or holding or principle covered by a protest review decision that is not specifically identified in the final modifying or revoking notice.

(c) *Treatment previously accorded to substantially identical transactions*—(1) *General.* The issuance of a prospective ruling that has the effect of modifying or revoking the treatment previously accorded by Customs to substantially identical transactions must be in accordance with the procedures set forth in paragraph (c)(2) of this section. For purposes of this section:

(i) "Treatment" means a consistent pattern of decisions involving the classification of imported merchandise under the Harmonized Tariff Schedule of the United States as determined upon liquidation of the applicable entry or reconciliation during the 2-year period immediately prior to publication of the notice of proposed modification or revocation

under this section. The determination of whether the requisite treatment occurred will be made by Customs on a case-by-case basis and will involve an assessment of all relevant factors. In particular, Customs will focus on the past transactions to determine whether there was an examination of the merchandise (where applicable) by Customs or the extent to which those transactions were otherwise reviewed by Customs to determine the proper application of the Customs laws and regulations. For purposes of establishing whether the requisite treatment occurred, Customs will give diminished weight to transactions involving small quantities or values, and Customs will give no weight whatsoever to informal entries and to other entries or transactions which Customs, in the interest of commercial facilitation and accommodation, processes expeditiously and without examination and/or import specialist review.

(ii) A person may not claim as a treatment the treatment that Customs accorded to transactions of another person; and

(iii) The burden of proof as regards the existence of the previous treatment is on the person claiming that treatment. The evidence of previous treatment by Customs must include a list of all substantially identical transactions by entry number (or other Customs assigned number), the quantity and value of merchandise covered by each transaction (where applicable), the ports of entry, and the dates of final action by Customs.

(2) *Notice procedures*—(i) When Customs has reason to believe that a contemplated prospective ruling would have the effect of modifying or revoking the treatment previously accorded by Customs to substantially identical transactions, notice of the intent to modify or revoke that treatment will be published in the CUSTOMS BULLETIN either as a separate action or in connection with a proposed modification or revocation of a prospective ruling or internal advice decision or holding or principle covered by a protest review decision under paragraph (b)(1) of this section. The notice will give interested parties 30 calendar days from the date of publication of the notice to submit written comments on the proposed modification or revocation and will invite any member of the public whose substantially identical transactions have been accorded the same treatment to advise Customs in writing of that fact, supported by appropriate details regarding those transactions, within that 30-day period. Within 30 calendar days after the close of the public comment period, any submitted comments will be considered, notice of the final prospective ruling or other final action on the proposed modification or revocation will be published in the CUSTOMS BULLETIN, and written confirmation of the applicability of a final modification or revocation will be provided to each person identified in the notice or during the public comment period as having had substantially identical transactions that were accorded the same treatment.

(ii) If Customs is not aware prior to issuance that a contemplated prospective ruling would have the effect of modifying or revoking the treat-

ment previously accorded by Customs to substantially identical transactions, the prospective ruling will be issued and generally will be effective as provided in § 177.19. However, Customs will, upon written application by a person claiming that the prospective ruling has the effect of modifying or revoking the treatment previously accorded by Customs to his substantially identical transactions, consider delaying the effective date of the prospective ruling with respect to that person, and continue the treatment previously accorded the substantially identical transactions, pending completion of the procedures set forth in paragraph (c)(2)(i) of this section.

(d) *Exceptions to notice requirements*—(1) *Publication and issuance not required.* The publication and issuance requirements set forth in paragraphs (b) and (c) of this section are inapplicable in circumstances in which a Customs position is modified, revoked or otherwise materially affected by operation of law or by publication pursuant to other legal authority or by other appropriate action taken by Customs in furtherance of an order, instruction or other policy decision of another governmental agency or entity pursuant to statutory or delegated authority. Such circumstances include, but are not limited to, the following:

(i) Adoption or amendment of a statutory provision, including any change to the Harmonized Tariff Schedule of the United States;

(ii) Promulgation of a treaty or other international agreement under the foreign affairs function of the United States;

(iii) Issuance of a Presidential Proclamation or Executive Order, or issuance of a decision or policy determination pursuant to authority delegated by the President;

(iv) Subject to the provisions of § 152.16 of this chapter, the rendering of a judicial decision which has the effect of overturning the Customs position;

(v) Publication of a decision in the Federal Register as a result of a petition by a domestic interested party pursuant to 19 U.S.C. 1516 (see part 175 of this chapter);

(vi) Publication of an interim or final rule in the Federal Register in accordance with 5 U.S.C. 553;

(vii) Publication of a final interpretative rule in the Federal Register in accordance with 5 U.S.C. 553 following public notice and comment procedures; and

(viii) Publication of a final ruling in the Federal Register in accordance with 19 U.S.C. 1315(d) and § 177.22 of this part relating to change of established and uniform practice.

(2) *Publication not required.* In the following circumstances a final modifying or revoking ruling will be issued to the person entitled to it under paragraph (b) or (c) of this section but CUSTOMS BULLETIN publication under paragraph (b) or (c) of this section is not required:

(i) The modifying ruling corrects a clerical error; or

(ii) The modifying or revoking ruling is directed to a ruling issued under subpart I of part 181 of this chapter relating to advance rulings under the North American Free Trade Agreement.

(e) *Effective date and application to transactions*—(1) *Rulings or decisions in effect for less than 60 days*. If a prospective ruling or internal advice decision or holding or principle covered by a protest review decision that is modified or revoked under this section had been in effect for less than 60 calendar days, the modifying or revoking ruling:

(i) Will be effective on its date of issuance with respect to the specific transaction covered by the modifying or revoking ruling; and

(ii) Will be applicable to merchandise entered, or withdrawn from warehouse for consumption, on and after its date of issuance.

(2) *Rulings or decisions in effect for 60 or more days*. If a prospective ruling or internal advice decision or holding or principle covered by a protest review decision that is modified or revoked under this section had been in effect for 60 or more calendar days, the modifying or revoking notice will, provided that liquidation of the entry in question has not become final, apply to merchandise entered, or withdrawn from warehouse for consumption:

(i) Sixty calendar days after the date of publication of the final modifying or revoking notice in the CUSTOMS BULLETIN under paragraph (b)(2) of this section; or

(ii) At the option of any person with regard to that person's transaction, on and after the date of publication of the final modifying or revoking notice in the CUSTOMS BULLETIN under paragraph (b)(2) of this section.

(3) *Previous treatment accorded to substantially identical transactions*. A final notice that modifies or revokes the treatment previously accorded by Customs to substantially identical transactions:

(i) Will be effective with respect to transactions that are substantially identical to the transaction described in the modifying or revoking notice 60 calendar days after the date of publication of the final modifying or revoking notice in the CUSTOMS BULLETIN under paragraph (b)(2) or paragraph (c)(2)(i) of this section; and

(ii) Provided that liquidation of the entry in question has not become final, will apply to merchandise entered, or withdrawn from warehouse for consumption:

(A) Sixty calendar days after the date of publication of the final modifying or revoking notice in the CUSTOMS BULLETIN under paragraph (b)(2) or paragraph (c)(2)(i) of this section; or

(B) At the option of a person who makes a valid claim regarding previous treatment, on and after the date of publication of the final modifying or revoking notice in the CUSTOMS BULLETIN under paragraph (b)(2) or paragraph (c)(2)(i) of this section.

#### **§ 177.22 Established and uniform practice.**

(a) *General*. In determining under this section that an established and uniform practice exists for purposes of 19 U.S.C. 1315(d):

(1) Only a practice regarding tariff classification under the Harmonized Tariff Schedule of the United States may be considered;

(2) The practice must involve 100 percent uniform treatment accorded by Customs through liquidations performed at multiple ports over an extended period of time. For purposes of this paragraph, "treatment accorded by Customs" means an actual review of entries and therefore does not include cases in which liquidation of an entry occurred without the direct, active involvement of Customs (for example, when liquidation took place by operation of law or involved bypass or automatic liquidation or similar procedures); and

(3) The burden of proof is on the importer except in a situation described in paragraph (c) of this section.

(b) *Change of established and uniform practice*—(1) *Publication*. Before the issuance of a ruling which has the effect of changing an established and uniform practice and which results in the imposition of a higher rate of duty or charge, notice that the established and uniform practice is under review will be published in the Federal Register and interested parties will be given an opportunity to make written submissions with respect to the correctness of the contemplated change. After the close of the public comment period, any submitted comments will be considered and a final ruling will be published in the Federal Register. The procedures set forth in this paragraph shall not apply with respect to a change of an established and uniform practice affecting the imposition of antidumping or countervailing duties.

(2) *Effective date*. A final ruling which changes an established and uniform practice under this section and results in the imposition of a higher rate of duty or charge will be effective with respect to merchandise entered, or withdrawn from warehouse for consumption, 30 calendar days after publication of that ruling in the Federal Register.

(c) *Notice of existence of an established and uniform practice*. Customs may, on its own initiative, publish in the Federal Register or CUSTOMS BULLETIN a notice informing the public of the existence of an established and uniform practice. Once published, that established and uniform practice will be subject to the requirements and limitations set forth in paragraph (b) of this section.

#### **§ 177.23 Limitation of court decisions.**

(a) *General*. Subject to the notice and comment procedures set forth in paragraph (b) of this section, Customs may issue a decision that limits the application of a court decision to the specific article or issue under litigation, or to an article of a specific class or kind of merchandise that was the subject of the court decision, or to the particular circumstances or entries which were the subject of the court decision.

(b) *Publication procedures*. When Customs contemplates promulgation of a decision that would limit a court decision, a notice of the proposed decision will be published in the CUSTOMS BULLETIN for public comment. Interested parties will have 30 calendar days from the date of publication of the proposed decision to submit comments. After the

close of the public comment period, any submitted comments will be considered and a final decision will be published in the CUSTOMS BULLETIN.

(c) *Effective date.* A final limiting decision promulgated pursuant to this section will be effective upon publication of the decision in the CUSTOMS BULLETIN.

#### **§ 177.24 Availability of rulings to the public.**

All rulings issued under this part, except those for which specific publication procedures are prescribed (see §§ 177.21, 177.22 and 177.23), will be published or made available for public inspection by electronic or other means within 90 calendar days after the date of issuance.

### **SUBPART C—INTERNAL ADVICE PROCEDURE**

#### **§ 177.31 Requests for advice by Customs offices in general.**

Advice or guidance as to the interpretation or proper application of the Customs and related laws with respect to a specific Customs transaction may be requested by Customs offices from the Headquarters Office or its designee at any time, whether the transaction is prospective, current, or completed. Advice as to the proper interpretation and application of the Customs and related laws with reference to a current transaction may be sought by a Customs office either on its own initiative or following a request made by an importer or other person having an interest in the transaction. Advice or guidance will be furnished by the Headquarters Office or its designee as a means of assisting Customs personnel in the orderly processing of Customs transactions under consideration by them and to ensure the consistent application of the Customs and related laws in the various Customs ports.

#### **§ 177.32 Requests for advice on current transactions.**

(a) *When a ruling has been issued—(1) Requests initiated by Customs.* If a ruling with respect to a prospective Customs transaction has been issued under subpart B of this part and the Customs office having jurisdiction over a current Customs transaction to which the ruling purports to relate believes that the ruling should be modified or revoked or for any other reason should not be applied to the current transaction, that office may, subject to the provisions of paragraph (c) of this section and in accordance with the procedures of paragraph (f) of this section, forward a request that the ruling be reconsidered or otherwise reviewed to determine its correctness or its applicability to the current transaction. The Customs office will notify the importer or other person having an interest in the current transaction, in writing, that it intends to refer the matter for internal advice. The written notice to the importer or other interested person will identify the specific issue to be reviewed under the internal advice procedure and will afford the importer or other interested person 30 calendar days to make a written submission on the issue, which should be provided to the Customs office issuing the notice, for inclusion with the request for internal advice.

(2) *Requests initiated by importers and others.* If a prospective ruling has been issued under subpart B of this part and the importer or other person having an interest in a current Customs transaction to which the ruling purports to relate disagrees with the Customs office having jurisdiction over the current transaction as to the correctness of the ruling or proper application of the ruling to the current transaction, the importer or other interested person may request in writing that the Customs office seek internal advice as to the correctness of the ruling or proper application of the ruling to the current transaction. Subject to the provisions of paragraph (c) of this section, a decision whether or not to seek internal advice in the circumstances outlined in this paragraph will be solely at the discretion of the Customs office, and the decision by that office will be made in writing within 30 calendar days of receipt of the written request from the importer or other interested person. If the Customs office agrees to seek internal advice, the request for internal advice will be submitted in accordance with paragraph (f) of this section.

(b) *When no ruling has been issued—(1) General.* Subject to the provisions of paragraph (c) of this section, internal advice may be sought by a Customs office with respect to a current Customs transaction to which no ruling issued under subpart A of this part purports to relate whenever there is a difference of opinion, including a difference of opinion involving two or more Customs offices, as to the interpretation or proper application of the Customs and related laws to the current transaction. This internal advice may be sought by the Customs office having jurisdiction over the current transaction either on its own initiative or in response to a written request from the importer or other person having an interest in the current transaction and will be submitted in accordance with paragraph (f) of this section. If the request for internal advice is initiated by the Customs office, that office will notify the importer or other interested person in writing that it intends to refer the matter for internal advice; the written notice will identify the specific issue to be reviewed under the internal advice procedure and will afford the importer or other interested person 30 calendar days to make a written submission on the issue, which should be provided to the Customs office issuing the notice, for inclusion with the request for internal advice. If the importer or other interested person submits a written request for the internal advice procedure, a decision whether or not to seek internal advice under this paragraph will be solely at the discretion of the Customs office except as otherwise provided in paragraph (b)(2) of this section; the decision will be made in writing within 30 calendar days of receipt of the written request from the importer or other interested person.

(2) *Differences in tariff application.* If an importer of merchandise knows that two or more Customs offices are allowing different tariff results for the same merchandise imported by that importer, that importer has an obligation, as a function of the exercise of reasonable care, to

bring that fact to the attention of Customs in connection with the filing of his entry covering that merchandise. When it comes to the attention of a Customs office through an importer or by any other means that two or more Customs offices are applying different tariff results to the same merchandise, that Customs office must seek internal advice in accordance with paragraph (f) of this section if:

(i) The offices cannot reach agreement on the proper action to be taken with respect to the merchandise; and

(ii) The matter at issue otherwise meets the requirements for internal advice under this subpart.

(c) *Criteria for internal advice*—(1) *When internal advice may be requested.* Except as otherwise provided in paragraph (c)(2) of this section, when a Customs office would otherwise not accept the position presented by an importer or other interested person in connection with a current transaction, that office may request internal advice if:

(i) The importer or other interested person demonstrates that his position is entirely consistent in all material respects with:

(A) A ruling issued under subpart B of this part;

(B) An internal advice decision issued under this subpart;

(C) A protest review decision issued under part 174 of this chapter;

(D) A decision made at any port with respect to a transaction that is substantially identical in all material respects; or

(E) A decision of the United States Court of International Trade or the United States Court of Appeals for the Federal Circuit or any court of appeal from that court;

(ii) The importer or other interested person demonstrates that the current transaction involves questions of law or fact which have not been ruled upon by the Commissioner of Customs or his designee or by the United States Court of International Trade or the United States Court of Appeals for the Federal Circuit or any court of appeal from that court; or

(iii) The current transaction involves matters previously ruled upon by the Commissioner of Customs or his designee or by the United States Court of International Trade or the United States Court of Appeals for the Federal Circuit or any court of appeal from that court, but the importer or other interested person demonstrates that the current transaction involves facts or legal issues which were not considered at the time of the earlier ruling.

(2) *Circumstances in which internal advice may not be requested.* A Customs office may not request internal advice on a current transaction if one of the criteria set forth in paragraph (c)(1) of this section is not met or in any of the following circumstances:

(i) If the importer or other interested person requested that internal advice be sought and the internal advice request would have the effect of seeking reconsideration of either a ruling previously issued to that importer or other interested person under subpart B of this part or a pro-

test review decision previously issued to that importer or other interested person under part 174 of this chapter;

(ii) When confidentiality issues raised in an internal advice submission cannot be resolved (see subpart D of this part);

(iii) When the issue involved is identical or similar to one that is the subject of a pending modification or revocation under § 177.21;

(iv) When an established and uniform practice involving an identical or similar transaction exists or is undergoing a change under § 177.22;

(v) When a limitation of a court decision involving an identical or similar transaction is pending under § 177.23;

(vi) When a protest review decision involving an identical or similar transaction is pending under part 174 of this chapter; or

(vii) When an identical or similar transaction is pending before the Court of International Trade or is on appeal from that court. For purposes of this paragraph, a transaction is "pending before the Court of International Trade" if a summons has been filed.

(d) *Content of submissions or requests by importers and others.* If an importer or other interested person makes a submission under paragraph (a)(1) or (b) of this section or requests that a Customs office seek internal advice under paragraph (a)(2) or (b) of this section, the written submission or request must contain a complete statement setting forth a description of the transaction, the specific questions presented, the applicable law, and an argument for the conclusions advocated. If the importer or other interested person wants Customs to accord confidential treatment to any information provided by him in connection with a request for internal advice under this section, a written request for that confidential treatment must be made when that information is provided to Customs and must conform to the requirements of subpart D of this part. If the importer or other interested person wants an opportunity to have a conference if issuance of an adverse decision is contemplated (see paragraph (f)(3) of this section), a statement to that effect must be included in the submission or request. In addition, where an importer or other interested person requests that a Customs office seek internal advice and relies upon the criterion set forth in paragraph (c)(1)(ii) of this section, the request must also contain, or provide as a signed attachment to the request, the following certification by a person having knowledge of the facts:

I certify that, to the best of my knowledge and belief, and except as otherwise stated herein, the transaction described in this request, or one similar, identical, or related to it, is not currently being considered by any other Customs office and will not be pending before any Customs office by virtue of a request for a prospective ruling or a request for internal advice or a protest filed simultaneously with this request and is not pending before any other Federal agency or before any Federal court, and that, to the best of my knowledge and belief, all information provided in connection with this request is accurate and complete.

(e) *Review of statements by importers and others.* Each written statement submitted by an importer or other interested person under paragraph (d) of this section will be reviewed by the Customs office to which it is submitted. In the event a difference of opinion exists as to the description of the transaction or as to the point or points at issue, the person submitting the statement will be so advised in writing. If agreement cannot be reached, the statement of the importer or other interested person, together with the written position of the Customs office, will be forwarded by the Customs office as a request for internal advice in accordance with paragraph (f) of this section.

(f) *Submission and processing of requests for internal advice—(1) Submission to, and decision by, the National Commodity Specialist Division.* If the request for internal advice on a current Customs transaction involves a matter on which the National Commodity Specialist Division may issue a prospective ruling (see § 177.11(a)(1)), the Customs office will submit the request to the Director, National Commodity Specialist Division, who will review the request to determine whether it meets the standards for internal advice set forth in paragraphs (c) and (d) of this section. At the conclusion of that review:

(i) If the request for internal advice is complete and meets the criteria for internal advice set forth in paragraph (c) of this section, the Director, National Commodity Specialist Division, will issue a written decision on the request to the submitting office within 30 calendar days of receipt of the request and will furnish a copy of the decision to the importer or other interested person, except in any of the following circumstances:

(A) The issue presented in the request involves a position of the submitting office that reflects a position already taken by the Director, National Commodity Specialist Division. In this case, the Director will return the request to the submitting office with instructions to handle the matter in accordance with that Customs position;

(B) The importer or other interested person has requested a conference in accordance with paragraph (f)(3) of this section and the Director, National Commodity Specialist Division, contemplates issuance of a decision adverse to the position of the importer or other person; or

(C) The Director, National Commodity Specialist Division, believes that the nature of the issue presented in the request requires consideration and decision by the Headquarters Office;

(ii) If the request for internal advice involves a circumstance described in paragraph (f)(1)(i)(B) or paragraph (f)(1)(i)(C) of this section, the Director, National Commodity Specialist Division, will forward the request to the Headquarters Office for consideration and decision; or

(iii) The Director, National Commodity Specialist Division, will return the request for internal advice to the submitting office without taking any further action on it if the request does not contain sufficient information on which to base a decision or if the request does not meet

the criteria for internal advice set forth in paragraph (c) of this section. The Director, National Commodity Specialist Division, will provide a written explanation of the reason the request is being returned without action.

(2) *Submission to, and decision by, the Headquarters Office.* If the request for internal advice on a current Customs transaction involves a matter on which only the Headquarters Office may issue a prospective ruling (see § 177.11(a)(2)), the Customs office will submit the request to the Headquarters Office. Following receipt of a request for internal advice submitted under this paragraph or forwarded under paragraph (f)(1)(ii) of this section, the Headquarters Office will review the request to determine whether it meets the standards for internal advice set forth in paragraphs (c) and (d) of this section. At the conclusion of that review, the Headquarters Office will issue a written decision on the request, including a refusal to furnish advice, to the submitting office and will furnish a copy of the decision to the importer or other interested person. The Headquarters Office may refuse to consider the questions presented to it in a request for internal advice whenever:

(i) The Headquarters Office determines that the period of time necessary to give adequate consideration to the questions presented would result in a withholding of action with respect to the transaction, or in any other situation that is inconsistent with the sound administration of the Customs and related laws; and

(ii) The questions presented can subsequently be raised by the importer or other interested party in the form of a protest filed under part 174 of this chapter.

(3) *Conferences on issues.* A request by the importer or other interested person for an opportunity to have a conference on an issue presented in a request for internal advice on a current Customs transaction will be granted only in connection with a decision to be issued by the Headquarters Office and only in circumstances in which the Headquarters Office contemplates issuance of a decision adverse to the position advocated by the importer or other interested person in the written submission or request prepared in accordance with paragraph (d) of this section. A conference held under this section will not conclude with the issuance of an internal advice decision and will be governed by the following principles and procedural requirements:

(i) A conference is scheduled for the purpose of affording the parties an opportunity to freely and openly discuss the matters set forth in the written submission or request of the importer or other interested person. Accordingly, the parties will not be bound by any argument or position advocated or agreed to, expressly or by implication, during the conference unless either party subsequently agrees to be so bound in writing.

(ii) If a request for a conference is granted, the person making the request will be contacted to arrange a time and place for the conference. No more than one conference with respect to the matters set forth in a

request for internal advice will be scheduled, unless, in the opinion of the Headquarters Office, additional conferences are necessary.

(iii) A person whose request for a conference has been granted may appear at the conference in person and may be accompanied by counsel or other representatives or, in lieu of a personal appearance, the person may designate an authorized agent to appear at the conference in his place.

(iv) It will be the responsibility of the person who requested the conference to provide for inclusion in the Headquarters Office file on the matter a written record setting forth any and all additional documents, exhibits, or other information introduced during the conference to the extent that person considers the material relevant to the consideration of the request for internal advice. Any further documentation, exhibits, or other information to be submitted as a result of the conference must be submitted to the Headquarters Office within 30 calendar days following the conference or within any longer period as the Headquarters Office may authorize.

(g) *Effect of internal advice decisions*—(1) *General*. Internal advice furnished by the Director, National Commodity Specialist Division, or by the Headquarters Office under this section represents the official position of Customs as to the interpretation and application of the Customs laws with reference to the facts of a specific transaction. Internal advice furnished under this section will be effective on the date of the written decision and will be applied by the Customs office in its disposition of the current transaction in question and in the disposition of future transactions of the importer or other interested person involving circumstances that are substantially identical in all material respects, provided that the decision has not been modified or revoked on appeal under § 177.33 or modified or revoked by a prospective ruling under § 177.21.

(2) *Third party reliance on internal advice decisions*. A person engaging in a Customs transaction who has not received a ruling covering that transaction may rely on an internal advice decision issued in connection with a Customs transaction of another person and made available to the public under § 177.24, and may assume that Customs will apply the principles of that internal advice decision to his transaction, provided that Customs determines that the relevant facts and principles reflected in the internal advice decision are materially the same as those involved in the transaction under consideration and provided that the internal advice decision has not been modified or revoked by operation of law or by Customs action (see § 177.21).

### **§ 177.33 Appeal of internal advice decisions on current transactions.**

(a) *Scope of appeal*. If an importer or other interested person on whose current transaction an internal advice decision was issued under § 177.32 believes that the decision is adverse to his position on one or more substantive issues reflected in the decision, that person, or his au-

thorized agent, may pursue an administrative appeal of that decision in accordance with the procedures set forth in this section. An appeal filed under this section must be limited to issues involving the construction of the law and will involve a *de novo* review of the decision which is the subject of the appeal. The decision on appeal may correct an erroneous statement in the original decision, may affirm the result reached in the original decision, may modify or revoke the original decision (see § 177.21), or may involve the issuance of a new decision if new or additional facts are presented in the appeal.

(b) *Form and address.* The appeal must be in the form of a signed letter written in the English language. In the case of an internal advice decision issued by the Headquarters Office, the appeal letter must be addressed to the Office of Regulations and Rulings, United States Customs Service, Washington, DC 20229. In the case of an internal advice decision issued by the Director, National Commodity Specialist Division, the appeal letter must be addressed to the Director, National Commodity Specialist Division, Office of Regulations and Rulings, United States Customs Service, New York, New York 10048, who will forward the appeal letter, together with any comments as may be appropriate, to the Headquarters Office for processing. The words "Internal Advice Appeal" should appear in a conspicuous place on the face of the envelope containing the appeal letter.

(c) *Time of filing.* The appeal must be filed within 30 calendar days of the effective date of the adverse internal advice decision. An appeal received by Customs after that 30-day appeal period will be rejected as untimely and will be returned to the person filing the appeal. The issues raised in a rejected appeal may be the subject of administrative review only in connection with a valid protest filed under part 174 of this chapter.

(d) *Content.* Each appeal letter should include a copy of the internal advice decision which is the subject of the appeal and any other information, documents, samples or other materials submitted by the importer or other interested person in connection with the original request for internal advice under § 177.32 which are not reflected in the internal advice decision and which the person filing the appeal deems relevant to the issues raised in the appeal.

(e) *Current or completed transactions.* The filing of an appeal under this section will not result in a suspension of liquidation in the case of current transactions pending resolution of such appeal and will not extend or otherwise affect the period for filing a protest under part 174 of this chapter. However, if a person has filed a timely appeal under this section, he may protest under part 174 any liquidation that is consistent with the original decision, and any resulting protest decision will reflect the decision on appeal under this section.

(f) *Confidential information.* If the person filing the appeal wants Customs to accord confidential treatment to any information submitted in connection with the appeal, a written request for that confi-

dential treatment must be made when the information is submitted to Customs and must conform to the requirements of subpart D of this part.

(g) *Processing of appeals*—(1) *General*. Appeals of adverse internal advice decisions will normally be processed in the order they are received and as expeditiously as possible. The provisions of § 177.32(f)(3) relating to conferences will apply to appeals under this section except that a conference on an appeal under this section will not be granted as a matter of right but rather only if the Headquarters Office believes that a conference is necessary. If a conference is held, the Headquarters Office may require additional time to prepare the decision on appeal.

(2) *Requests for expedited consideration*. If a request that an appeal be given expedited consideration is made in the appeal letter with a reasonable showing of business necessity for that treatment, the appeal will be decided no later than 60 calendar days following the date on which the appeal is filed with Customs except when the publication requirements of § 177.21 are applicable.

(3) *Issuance of decision*. Each appeal will be decided solely on the written record before Customs, that is, the record on the original appealed internal advice decision plus the appeal letter submission and any timely submission made after a conference and any other information that Customs determines to be relevant. The Headquarters Office will issue a written decision on the appeal to the person who filed the appeal or to any other person designated for that purpose in the appeal letter, and a copy of the appeal decision will be provided to the Customs field office and to the Director, National Commodity Specialist Division.

(4) *Effective dates*. If the decision on appeal affirms the result reflected in the original internal advice decision, that original decision will remain in effect for purposes of this subpart. If it is determined on appeal that the original internal advice decision is in error in whole or in part or is otherwise not in accord with the current views of Customs, the decision on appeal will be given effect as follows:

(i) If the decision on appeal is issued less than 60 calendar days after the effective date of the original internal advice decision, the decision on appeal will constitute a modification or revocation of the original internal advice decision with regard to the issue or issues raised on appeal and the result reflected in the decision on appeal will be applied to Customs transactions as follows:

(A) If final Customs action has not been taken on the current transaction that was the subject of the original internal advice decision, Customs will follow the decision on appeal in handling the current transaction; or

(B) If final Customs action has been taken on the current transaction that was the subject of the appeal, Customs will take the decision on appeal into account in considering a valid protest filed against that final action under part 174 of this chapter; or

(ii) If the decision on appeal is issued 60 or more calendar days after the effective date of the original internal advice decision, the original internal advice decision will be modified or revoked in accordance with the procedures set forth in § 177.21, and the decision on appeal will take effect on the effective date of the ruling that modifies or revokes the original internal advice decision (see § 177.21(e)).

#### **§ 177.34 Availability of internal advice decisions to the public.**

An internal advice decision issued under this subpart will be made available for public inspection in accordance with § 177.24.

#### **SUBPART D—DISCLOSURE OF CONFIDENTIAL BUSINESS INFORMATION**

##### **§ 177.41 Treatment of requests for confidentiality.**

(a) *General availability of information.* Consistent with the basic principle of availability of information reflected in the Freedom of Information Act (the FOIA, 5 U.S.C. 552) and part 103 of this chapter, the general practice of Customs is to treat all information submitted under this part as a matter of public record that is available to the general public. However, a person who provides information to Customs in connection with a ruling or appeal under subpart B of this part, or who provides information to Customs in connection with an internal advice request or appeal under subpart C of this part, may in accordance with paragraph (b) of this section request that Customs accord confidential treatment to that information if the person does not want it to be disclosed to the public.

(b) *Submission of requests for confidential treatment.* A request for confidential treatment under this section must conform to the following standards:

(1) The request must be in writing and must relate to information that is alleged to constitute trade secrets or other confidential commercial or financial information regarding the business transactions of an interested person, the disclosure of which would cause substantial harm to the competitive position of that person;

(2) The request must clearly identify the information that is the subject of the request;

(3) The request must set forth the reasons why the information should not be disclosed, including the reasons the disclosure of the information would prejudice the competitive position of the interested person;

(4) The request must be supported by a signed statement by the interested person, or by an officer or authorized employee of an interested party company, certifying that the information in question is confidential commercial or financial information and is not already in the public domain; and

(5) A failure to request confidential treatment at the time the information in question is submitted to Customs will constitute a waiver of confidential treatment. Accordingly, a request for confidential treat-

ment will not be entertained under this subpart if the information to which the request relates was submitted to Customs without a request for confidential treatment.

(c) *Disposition of requests for nondisclosure*—(1) *General*. An issue of confidentiality raised under paragraph (b) of this section will be resolved with reference to the principles that apply under Exemption 4 of the FOIA (5 U.S.C. 552(b)(4)) and under 31 CFR part 1 and under part 103 of this chapter. A request for a conference to discuss an issue of confidentiality will be granted only if Customs believes that a conference is necessary. Each issue of confidentiality must be resolved to the satisfaction of Customs and the person who submitted the information to Customs before Customs will consider the substance of the ruling request or submission or appeal which contains the information at issue, except in the case of information submitted in connection with a prospective ruling or request for internal advice that was initiated by Customs (see paragraph (c)(2)(ii) of this section). If the issue of confidentiality is resolved to the mutual satisfaction of Customs and the person who submitted the information at issue, Customs will grant the request for confidential treatment by written notice to the person who made that request. Customs will then resume consideration of the appropriate ruling or internal advice decision or decision on appeal in accordance with subpart B or subpart C of this part.

(2) *Failure to agree on confidential treatment*—(i) *Action not initiated by Customs*. In the case of a ruling request or request for internal advice that was made or initiated by an importer or other interested party, or in the case of an appeal of any ruling or internal advice decision, if an issue of confidentiality raised under paragraph (b) of this section cannot be resolved to the mutual satisfaction of Customs and the person who submitted the information to Customs, or if Customs determines for any other reason that there is not a sufficient basis for granting the request for confidential treatment, Customs will in writing notify the person that his request for confidential treatment is denied. In this case, no further submission will be accepted, and no conference will be held, on the issue of confidentiality after that notification. The person who submitted the information to Customs will be given 10 working days from the date of the notification letter to advise Customs in writing that he is withdrawing the ruling request or submission or appeal which contains the information at issue, and Customs will take one of the following actions:

(A) If the issue of confidentiality relates to information submitted with the original ruling request or submission or appeal and the person who made the ruling request or submission or filed the appeal either withdraws the ruling request or submission or appeal or fails to do so in writing within the prescribed 10-day period, Customs will close the case file without action. Customs also will return the ruling request or submission or appeal to the person who filed it unless a FOIA request for

any of that information has been filed under paragraph (d) of this section; or

(B) If the issue of confidentiality relates only to information provided to Customs in a further submission which supplements a ruling request or submission or appeal and the person who made the original ruling request or submission or filed the appeal either withdraws the further submission or fails to do so in writing within the prescribed 10-day period, Customs will return the further submission to the person who made the original ruling request or submission or filed the appeal without considering it and will proceed with consideration of the ruling request or submission or appeal as originally submitted so long as it has not been withdrawn in accordance with paragraph (c)(2)(i)(A) of this section.

(ii) *Action initiated by Customs.* In the case of information contained in a submission made either in connection with a prospective ruling initiated by Customs under § 177.17(b) or in connection with a request for internal advice initiated by Customs under § 177.32(a)(1) or (b), if an issue of confidentiality raised under paragraph (b) of this section cannot be resolved to the mutual satisfaction of Customs and the person who submitted the information to Customs, or if Customs determines for any other reason that there is not a sufficient basis for granting the request for confidential treatment, Customs will in writing notify that person. Customs will proceed with the prospective ruling or internal advice decision notwithstanding the failure to reach agreement on the confidentiality issue but will attempt to prepare the prospective ruling or internal advice decision in such a way as to avoid disclosure of the information claimed to be confidential to the greatest extent practicable and consistent with the need to prepare meaningful rulings and decisions.

#### **§ 177.42 Time limitation.**

A grant of confidential treatment under this subpart will be valid for a period of 3 years or for any shorter period of time specified in the written notice provided under § 177.41(c)(1), after which time it will automatically expire by operation of law unless renewed under § 177.43. Even if a grant expires, the information given confidential treatment will only be disclosed to the public pursuant to the Freedom of Information Act.

#### **§ 177.43 Renewal of confidential treatment.**

A grant of confidential treatment under this subpart will be considered for renewal for one or more additional periods not to exceed 3 years for each renewal period if a written request for renewal is received by Customs during the 3-month period prior to the scheduled expiration date. A request received either prior to the start of that 3-month period or on or after the scheduled expiration date will be rejected as untimely, unless the requester shows good cause for the failure to make the request during that 3-month period. The request for renewal should be in the form of a letter and must contain a detailed explanation as to why the information continues to require confidential treatment. Customs

will advise the requester in writing of the decision on the request for the extension.

#### **§ 177.44 Disclosure pursuant to the FOIA.**

(a) *General.* Business information provided to Customs as part of a ruling request or other written submission or appeal under subpart B of this part, or provided to Customs in connection with an internal advice request or appeal under subpart C of this part, may be the subject of a request for disclosure under the Freedom of Information Act (the FOIA, 5 U.S.C. 552) prior to resolution of a request for confidential treatment or subsequent to a grant of confidential treatment under § 177.41 or when no request for confidential treatment has been made or granted under § 177.41. In any of these cases, the business information will not be disclosed pursuant to a FOIA request if, in the opinion of Customs, it falls within the scope of Exemption 4 of the FOIA.

(b) *Notice to ruling requester or submission filer or appellant and FOIA requester*—(1) *Notice to ruling requester or submission filer or appellant.* Except as otherwise provided in paragraph (f) of this section, Customs will provide a ruling requester or submission filer or appellant with prompt notice of receipt of a request under the FOIA encompassing his business information whenever the ruling requester or submission filer or appellant has in good faith designated the information as commercially or financially sensitive information (even if Customs previously did not grant a request for confidential treatment under § 177.41) or whenever Customs has reason to believe that disclosure of the information may result in commercial or financial injury to the ruling requester or submission filer or appellant. The notice will either describe the exact nature of the information requested or provide copies of the records or portions of records containing the information and will advise the ruling requester or submission filer or appellant of its right to file an objection to the requested disclosure in accordance with the procedures set forth in paragraph (c) of this section. Customs will also provide a copy of the FOIA request.

(2) *Notice to FOIA requester.* When notice is given to a ruling requester or submission filer or appellant under paragraph (b)(1) of this section, Customs will in writing notify the FOIA requester that the notice has been given to the ruling requester or submission filer or appellant. The notice will also advise the FOIA requester that a delay by Customs in responding to the request may be considered a denial of access to records and that the FOIA requester may proceed with an administrative appeal or seek judicial review, if appropriate, in accordance with the FOIA and any applicable regulations. The notice will invite the FOIA requester to agree to a voluntary extension of time so that Customs may review the ruling requester's or submission filer's or appellant's objection to disclosure.

(c) *Filing of objection to disclosure.* The ruling requester or submission filer or appellant may, within 10 working days of the date of the notice provided for in paragraph (b)(1) of this section, file with Customs a

detailed statement of any objection to disclosure. The statement must specify all grounds for withholding any of the information under any exemption under paragraph (b) of the FOIA, and, in the case of Exemption 4, must demonstrate why the information is considered to be a trade secret or commercial or financial information that is privileged or confidential.

(d) *Notice of intent to disclose.* Customs will consider any objections filed by a ruling requester or submission filer or appellant under paragraph (c) of this section and any other specific grounds for nondisclosure prior to determining whether to disclose the information pursuant to the FOIA request. If Customs determines that disclosure should be made over the objections of the ruling requester or submission filer or appellant, Customs will provide to the ruling requester or submission filer or appellant a written notice of that determination. The notice, a copy of which will be provided to the FOIA requester, will include:

- (1) A statement of the reasons the ruling requester's or submission filer's or appellant's objections to disclosure were not sustained;
- (2) A general description of the information to be disclosed; and
- (3) A specific date for disclosure which will be 10 working days after the date appearing on the notice.

(e) *Notice of FOIA lawsuit.* Whenever a FOIA requester brings suit seeking to compel disclosure of information provided to Customs as part of a ruling request or other written submission or appeal under subpart B of this part or provided to Customs in connection with an internal advice request or appeal under subpart C of this part, Customs will promptly provide written notification of the suit to the ruling requester or submission filer or appellant.

(f) *Exceptions to notice requirements.* The notice requirements of this section will not apply if:

- (1) Customs has granted confidential treatment for the information under § 177.41 and intends to continue to honor that grant;
- (2) Customs has otherwise determined, by application of Exemption 4 of the FOIA or pursuant to any other provision of law, that the information should not be disclosed;
- (3) The information lawfully has been published or otherwise made available to the public; or
- (4) Disclosure of the information is required by a provision of law other than the FOIA.

2. In newly redesignated § 177.52, paragraph (b)(2) is amended by removing the reference "§ 177.25(a)" and adding, in its place, the reference "§ 177.55(a)".

3. In newly redesignated § 177.54, the first sentence is amended by removing the reference "§ 177.23" and adding, in its place, the reference "§ 177.53".

4. In newly redesignated § 177.55, paragraph (b)(1) is amended by removing the reference "§ 177.24" and adding, in its place, the reference "§ 177.54".

5. In newly redesignated § 177.57, the first sentence is amended by removing the reference “§ 177.23” and adding, in its place, the reference “§ 177.53”, and the second sentence is amended by removing the reference “§ 177.4” and adding, in its place, the reference “§ 177.13”.

6. In newly redesignated § 177.58, paragraph (c) is amended by removing the reference “§ 177.25(b)(5)” and adding, in its place, the reference “§ 177.55(b)(5)”.

7. In newly redesignated § 177.60, the first sentence is amended by removing the reference “§ 177.22(d)” and adding, in its place, the reference “§ 177.52(d)”.

8. In newly redesignated § 177.61, the last sentence is amended by removing the reference “§ 177.29” and adding, in its place, the reference “§ 177.59” and removing the reference “§ 177.30” and adding, in its place, the reference “§ 177.60”.

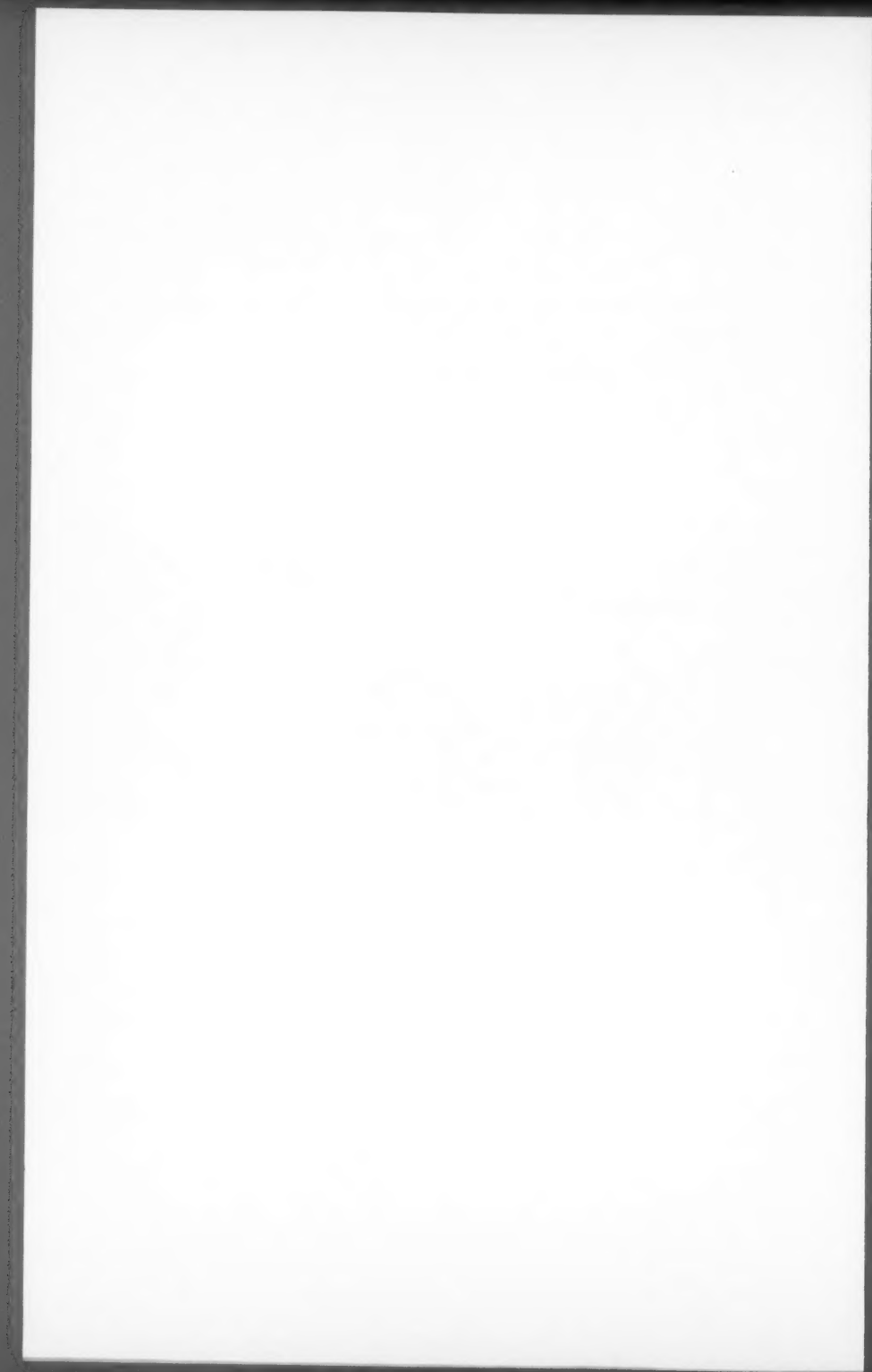
RAYMOND W. KELLY,  
*Commissioner of Customs.*

Approved: July 9, 2001.

TIMOTHY E. SKUD,

*Acting Deputy Assistant Secretary of the Treasury.*

[Published in the Federal Register, July 17, 2001 (66 FR 37370)]



# United States Court of International Trade

One Federal Plaza  
New York, N.Y. 10278

## *Chief Judge*

Gregory W. Carman

## *Judges*

Jane A. Restani  
Thomas J. Aquilino, Jr.  
Donald C. Pogue  
Evan J. Wallach

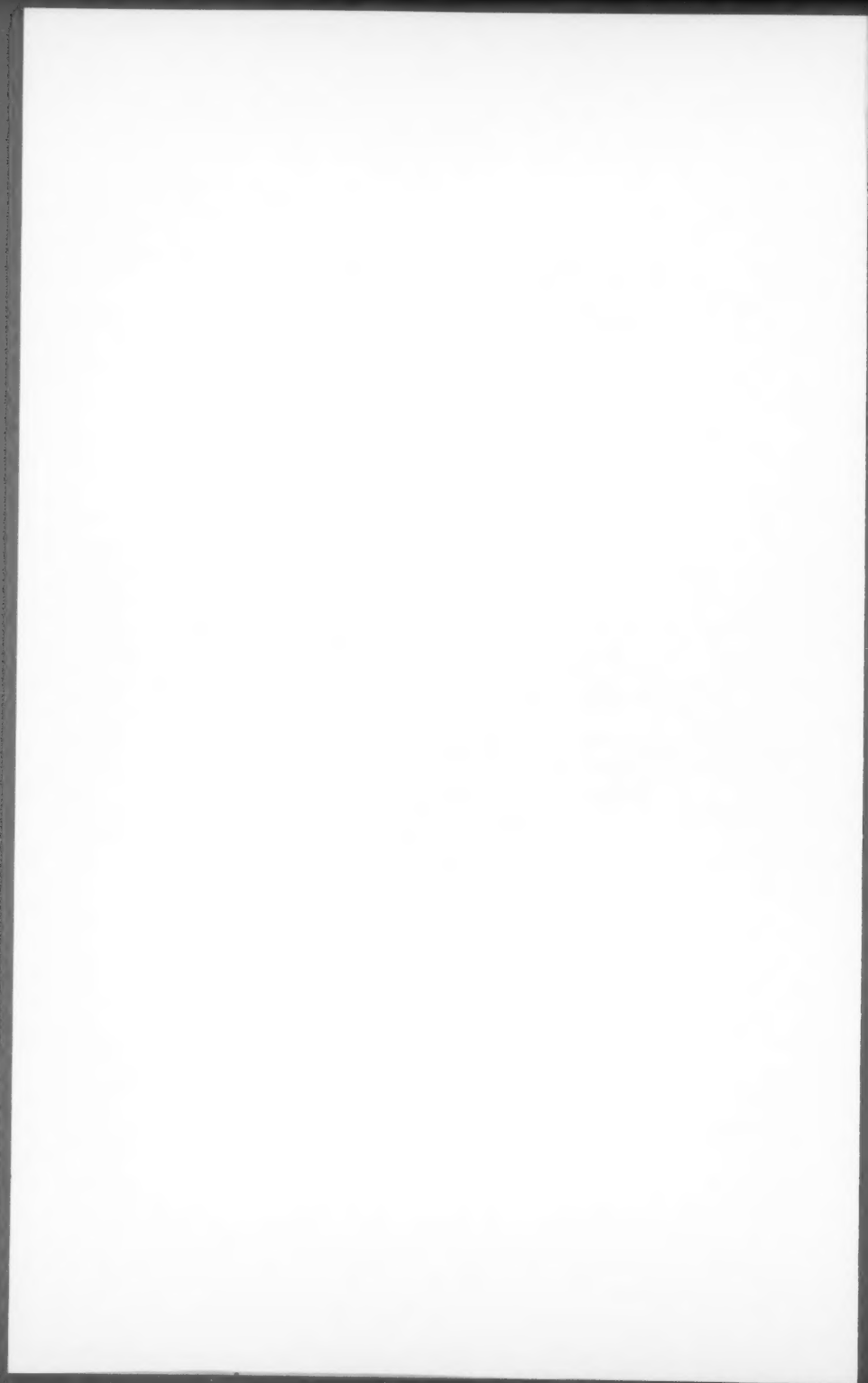
Judith M. Barzilay  
Delissa A. Ridgway  
Richard K. Eaton

## *Senior Judges*

James L. Watson  
Herbert N. Maletz  
Nicholas Tsoucalas  
R. Kenton Musgrave  
Richard W. Goldberg

## *Clerk*

Leo M. Gordon



# Decisions of the United States Court of International Trade

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(Slip Op. 01-82)

FABRIQUE DE FER DE CHARLEROI S.A., PLAINTIFF *v.* UNITED STATES,  
DEFENDANT AND BETHLEHEM STEEL CORP AND U.S. STEEL GROUP A UNIT  
OF USX CORP, DEFENDANT-INTERVENORS

Court No. 98-02-00359

Plaintiff, Fabrique de Fer de Charleroi S.A. ("FAFER"), moves pursuant to USCIT R. 56.2 for judgment upon the agency record challenging various aspects of the United States Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Final Results of Antidumping Duty Administrative Review of Certain Cut-to-Length Carbon Steel Plate From Belgium* ("Final Results"), 63 Fed. Reg. 2959 (Jan. 20, 1998). Specifically, FAFER disputes: (1) Commerce's use of FAFER's general commission as a proxy for FAFER's indirect selling expenses; and (2) Commerce's decision that FAFER's antidumping duties have been absorbed.

*Held:* FAFER's USCIT R. 56.2 motion is granted in part and denied in part. This case is remanded to Commerce to: (1) examine the record for determination of what data should be used as a substitute for FAFER's indirect selling expenses; and (2) take further actions not inconsistent with this opinion.

[FAFER's motion is granted in part and denied in part. Case remanded].

(Dated July 3, 2001)

*Barnes, Richardson & Colburn* (Gunter von Conrad, Michael J. Chessler and Alyssa Chumnanvech) for plaintiff.

*Stuart E. Schiffer*, Acting Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Velta A. Melnbrensis*, Assistant Director); of counsel: *Bernd G. Janzen*, Office of the Chief Counsel for Import Administration, United States Department of Commerce, for the United States.

*Dewey Ballantine LLP* (Michael H. Stein, Bradford L. Ward and Frank J. Schweitzer) for defendant-intervenors.

## OPINION

*TSOUCALAS, Senior Judge:* Plaintiff, Fabrique de Fer de Charleroi S.A. ("FAFER"), moves pursuant to USCIT R. 56.2 for judgment upon the agency record challenging various aspects of the United States Department of Commerce, International Trade Administration's ("Commerce") final determination, entitled *Final Results of Antidumping*

*Duty Administrative Review of Certain Cut-to-Length Carbon Steel Plate From Belgium ("Final Results")*, 63 Fed. Reg. 2959 (Jan. 20, 1998). Specifically, FAFER disputes: (1) Commerce's use of FAFER's general commission as a proxy for FAFER's indirect selling expenses; and (2) Commerce's decision that FAFER's antidumping duties have been absorbed.

#### BACKGROUND

This case concerns the antidumping duty order on cut-to-length carbon steel plate imported to the United States from Belgium during the 1995-96 period of review ("POR"). See *Antidumping Duty Order and Amendment to Final Determination of Sales at Less Than Fair Value: Certain Cut-to-Length Carbon Steel Plate From Belgium ("Antidumping Duty Order")*, 58 Fed. Reg. 44,164 (Aug. 19, 1993). Commerce published the preliminary results of the subject review on September 15, 1997. See *Cut-to-Length Carbon Steel Plate From Belgium: Preliminary Results of Antidumping Duty Administrative Review*, 62 Fed. Reg. 48,213. Commerce published the *Final Results* on January 20, 1998. See 63 Fed. Reg. 2959. FAFER initiated the case at bar against Commerce on February 18, 1998, and on April 30, 1998, this Court granted consent motion to Bethlehem Steel Corporation and U.S. Steel Group A Unit of USX Corporation ("Domestic Producers") to enter as defendant-intervenor.

#### JURISDICTION

The Court has jurisdiction over this matter pursuant to 19 U.S.C. § 1516a(a) (1994) and 28 U.S.C. § 1581(c) (1994).

#### STANDARD OF REVIEW

The Court will uphold Commerce's final determination in an antidumping administrative review unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law \* \* \*." 19 U.S.C. § 1516a(b)(1)(B)(i) (1994); see *NTN Bearing Corp. of Am. v. United States*, 24 CIT \_\_\_, \_\_\_, 104 F. Supp. 2d 110, 115-16 (2000) (detailing Court's standard of review in antidumping proceedings).

#### *A. Commerce's Use of FAFER's General Commissions as a Proxy for FAFER's Indirect Selling Expenses*

##### *1. Background*

On August 19, 1993, Commerce published the *Antidumping Duty Order* covering merchandise subject to the review. See 58 Fed. Reg. 44,164. On September 17, 1996, Commerce duly initiated the review at issue. See *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 61 Fed. Reg. 48,882. On September 19, 1996, Commerce issued to FAFER its standard questionnaire instructing FAFER, among other things, to report various expenses that FAFER incurred in its home market and the United States, inclusive of FAFER's indirect selling expenses related to the United States sales. See Def.'s Mem. Opp. Pl.'s Mot. J. Agency R. ("Def.'s Mem."), Ex. 1. Later on, Commerce issued a

supplemental questionnaire seeking additional information and clarifications. See Def.'s Mem., Ex. 3.

Both questionnaires provided very specific instructions with regard to the format in which Commerce expected FAFER to submit the information sought. See *id.*, Ex. 1, 3. Responding to the questionnaires, FAFER did not identify FAFER's indirect selling expenses related to the United States sales in the way and with the specificity that Commerce requested. See Pl.'s Br. Sup. Mot. Summ. J. ("Pl.'s Br.") at 10. FAFER, however, notified Commerce that the submitted data: (a) was derived from FAFER's internal "Cost of Production Analysis System" ("COPAS"); (b) did not "distinguish between direct and indirect labor costs" due to the structural deficiencies of COPAS, Pl.'s Reply Br. Supp. Mot. Summ. J. ("Pl.'s Reply") at 5 and 6, n.7; and (c) provided the calculation of FAFER's general and administrative expenses ("G&A") that included employees wages and charges. See Pl.'s Br., App. 13.

Commerce was left unsatisfied with the information provided by FAFER. See *Preliminary Results*, 62 Fed. Reg. 48,213-14. During the review, Commerce determined that FAFER's United States sale was a constructed export price ("CEP") sale, that is, a sale of the subject merchandise to an unaffiliated purchaser through an intermediary, the price for which had to be adjusted under subsections (c) and (d) of 19 U.S.C. § 1677a (1994) to account for FAFER's various direct and indirect selling expenses. See *Preliminary Results*, 62 Fed. Reg. at 48,214; 19 U.S.C. § 1677a(b)-(d) (1994). Missing the information on FAFER's indirect selling expenses, Commerce resorted to the facts available in reaching the applicable determination. See Def.'s Mem. 33-38. Specifically, Commerce used FAFER's general policy commission rate as a proxy for FAFER's indirect selling expenses even though Commerce established that "FAFER paid no commission upon its sole [United States] sale to its subsidiary, Charleroi USA" ("Charleroi"). *Id.* at 37.

## 2. Exhaustion of Administrative Remedies

### a. Contentions of the Parties

As a preliminary matter, Commerce contends that the issues of whether Commerce properly: (a) "double-counted [indirect selling] expenses"; and (b) refused to entertain the shortcomings of FAFER's accounting system, should not be examined by this Court because FAFER failed to question these issues before Commerce and, consequently, forfeited its right to judicial review. Def.'s Mem. at 28.

FAFER alleges that the issues were sufficiently presented for Commerce's consideration when FAFER: (1) stated the deficiencies of COPAS; and (2) pointed out that G&A calculation was made on the basis of employees wages and charges that have already been taken into account. See Pl.'s Reply at 6.

### b. Analysis

The exhaustion doctrine requires a party to present its claims to the relevant administrative agency for the agency's consideration before

raising these claims to the Court. See *Unemployment Compensation Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155 (1946) ("A reviewing court usurps the agency's function when it sets aside the administrative determination upon a ground not theretofore presented and deprives the [agency] of an opportunity to consider the matter, make its ruling, and state the reasons for its action").<sup>1</sup>

The purpose behind the doctrine of exhaustion is to prevent courts from premature involvement in administrative proceedings, and to protect agencies "from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Lab. v. Gardner*, 387 U.S. 136, 148-49 (1967); see also *Public Citizen Health Research Group v. Commissioner, FDA*, 740 F.2d 21, 29 (D.C. Cir. 1984) (pointing out that the exhaustion doctrine serves "four primary purposes: [(1)] it ensures that persons do not flout established administrative processes"; (2) "it protects the autonomy of agency decisionmaking"; (3) it aids judicial review by permitting factual development of issues relevant to the dispute; and (4) "it serves judicial economy by avoiding repetitious administrative and judicial factfinding" and by resolving sole claims without judicial intervention.)

While a plaintiff cannot circumvent the requirements of the doctrine of exhaustion by merely mentioning a broad issue without raising a particular argument, plaintiff's brief statement of the argument is sufficient if it alerts the agency to the argument with reasonable clarity and avails the agency with an opportunity to address it. See generally, *Hormel v. Helvering*, 312 U.S. 552 (1941); see also *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990). The sole fact of agency's failure to address plaintiff's challenge does not invoke the exhaustion doctrine and shall not result in forfeiture of plaintiff's judicial remedies. See generally, *B-West Imports, Inc. v. United States*, 19 CIT 303, 880 F.Supp. 853 (1995). An administrative decision not to address the issue cannot be dispositive of the question whether or not the issue

<sup>1</sup> There is, however, no absolute requirement of exhaustion in the Court of International Trade in non-classification cases. See *Alhambra Foundry Co. v. United States*, 12 CIT 343, 346-47, 685 F.Supp. 1252, 1255-56 (1988). Section 2637(d) of Title 28 (1994) directs that "the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." By its use of the phrase "where appropriate," Congress vested discretion in the Court to determine the circumstances under which it shall require the exhaustion of administrative remedies. See *CEMEX, S.A. v. United States*, 133 F.3d 997, 995 (Fed. Cir. 1998). Therefore, because "each exercise of judicial discretion in not requiring litigants to exhaust administrative remedies," the Court is authorized to determine proper exceptions to the doctrine of exhaustion. *Alhambra Foundry*, 12 CIT at 347, 685 F.Supp. at 1256 (citing *Timken Co. v. United States*, 10 CIT 86, 93, 630 F.Supp. 1327, 1334 (1986), *rev'd in part on other grounds*, *Koyo Seiko Co. v. United States*, 20 F.3d 1156 (Fed. Cir. 1994)).

In the past, the Court has exercised its discretion to obviate exhaustion where: (1) requiring "it would be futile," see *Rhone Poulenc, S.A. v. United States*, 7 CIT 133, 135, 583 F.Supp. 607, 610 (1984) ("it appears that it would have been futile for plaintiffs to argue that the agency should not apply its own regulation"), or would be "inequitable and an insistence of a useless formality" as in the case where "there is no relief which plaintiff may be granted at the administrative level," *United States Cane Sugar Refiners' Ass'n v. Block*, 3 CIT 196, 201, 544 F.Supp. 883, 887 (1982); (2) a subsequent court decision has interpreted existing law after the administrative determination at issue was published, and the new decision might have materially affected the agency's actions, see *Timken*, 10 CIT at 93, 630 F.Supp. at 1334; (3) the question is one of law and does not require further factual development and, therefore, the court does not invade the province of the agency by considering the question, see *id.*; *R.R. Yardmasters of Am. v. Harris*, 721 F.2d 1332, 1337-39 (D.C. Cir. 1983); and (4) the plaintiff had no reason to suspect that the agency would refuse to adhere to clearly applicable precedent. See *Philipp Bros., Inc. v. United States*, 10 CIT 76, 79-80, 630 F.Supp. 1317, 1321 (1986).

was properly brought to the agency's attention. See, e.g., *Allnutt v. United States DOJ*, 2000 U.S. Dist. LEXIS 4060 (D. Md. 2000).

In the case at bar, Commerce advised FAFER that common examples of indirect selling expenses are "inventory carrying costs, salesmen's salaries, \*\*\* product liability insurance[,], \*\*\* technical services [and] warranty repairs." See Def.'s Mem. at 27 (emphasis supplied). FAFER stated that its G&A costs included "employees wages [that have already been taken into account,] \*\*\* [i]nsurance costs [and] \*\*\* research costs." Pl.'s Br. App. 13 (emphasis supplied). FAFER also notified Commerce that its accounting system did not "distinguish between direct and indirect" expenses. Pl.'s Reply at 6, n.7, accord Def.'s Mem. Ex. 5. While Commerce chose to read these two statements as asserting neither that FAFER's "G&A costs \*\*\* included [FAFER's] indirect selling expenses," nor that FAFER's "financial accounting system precluded the identification of indirect selling expenses," Def.'s Mem. at 30, FAFER's responses sufficiently provided Commerce with an opportunity to address the issues. The Court, therefore, concludes that FAFER properly exhausted its administrative remedies and has the right to raise these issues to the Court.

### 3. Commerce's Resort to Facts Available

#### a. Contentions of the Parties

Commerce contends that "FAFER's failure to[:] (1) report [FAFER's United States] indirect selling expenses[;] and (2) explain why Commerce should [assume] \*\*\* that there simply were no such expenses, \*\*\* warranted an adjustment based upon the facts available." Def.'s Mem. at 36 (citing to *Final Results*, 63 Fed. Reg. at 2963). Domestic Producers similarly assert that Commerce's resort to facts available was justified in view of the shortcomings of the information submitted by FAFER. See Domestic Producers' Resp. Pl.'s R. 56.2 Mot. J. Agency R. ("Domestic Producers' Resp.") at 10-11.

FAFER argues that Commerce was not entitled to resort to the facts available because: (1) FAFER included its home market indirect selling expenses in its cost responses; and (2) Commerce verified all the data submitted by FAFER. See Pl.'s Br. at 9-19.

#### b. Analysis

When Commerce cannot obtain the information in a timely manner or receives incomplete information, the appropriate statute allows and, in certain circumstances, requires Commerce to use facts available. See 19 U.S.C. § 1677e(a), (b) (1994). Specifically, section 1677e(a) of Title 19 provides that "if \*\*\* necessary information is not available on the record, or \*\*\* any \*\*\* person \*\*\* fails to provide such information by the deadlines for submission of the information or in the form and manner requested[,], \*\*\* [Commerce] shall \*\*\* use the facts otherwise available in reaching the applicable determination \*\*\*." 19 U.S.C. § 1677e(a) (emphasis supplied). Furthermore, if "an interested party \*\*\* fail[s] to cooperate by not acting to the best of its ability to comply

with a request for information from [Commerce, Commerce], in reaching the applicable determination \* \* \*, may use an inference that is adverse to the interests of that party [and is] \* \* \* derived from \* \* \* any \* \* \* information placed on the record." 19 U.S.C. § 1677e(b).

The legislative goal behind Commerce's right to use facts available is to "induce respondents to provide Commerce with requested information in a timely, complete, and accurate manner \* \* \*." *National Steel Corp. v. United States*, 18 CIT 1126, 1129, 870 F. Supp. 1130, 1134 (1994) (citation omitted). Consequently, Commerce enjoys very broad, although not unlimited, discretion with regard to the propriety of its use of facts available. See generally, *Olympic Adhesives, Inc. v. United States*, 899 F.2d 1565 (Fed. Cir. 1990) (acknowledging Commerce's broad discretion with regard to the use of facts available but pointing out that Commerce's resort to facts available is an abuse of discretion where the information Commerce requests does not and could not exist).

If a party, however,

promptly \* \* \* notifies [Commerce] that such party is unable to submit the information requested in the requested form and manner [and provides Commerce] with a full explanation and suggested alternative forms in which such party is able to submit the information, [Commerce] shall consider the ability of the \* \* \* party to submit the information in the requested form and manner and may modify [Commerce's] requirements to the extent necessary to avoid imposing an unreasonable burden on that party.

19 U.S.C. § 1677m(c)(1) (1994) (emphasis supplied).

Furthermore, Commerce

shall not decline to consider information that is submitted \* \* \* and is necessary to the determination but does not meet all the applicable requirements \* \* \* if— \* \* \* the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination, \* \* \* and \* \* \* the information can be used without undue difficulties.

19 U.S.C. § 1677m(e)(3) and (5) (1994) (emphasis supplied).

During the review at issue, Commerce requested FAFER to submit a per-unit G&A rate, to which selling expenses had to be added to arrive at a selling, general and administrative ("SG&A") rate. See Def.'s Mem. at 31. FAFER, however, failed to report indirect selling expenses in the manner required by Commerce. See Pl.'s Br. at 9-14. While Commerce should have considered the shortcomings of FAFER's accounting system, Commerce had discretion in determining whether: (1) Commerce was satisfied with "suggested alternative forms in which [FAFER was] able to submit the information"; (2) Commerce was "imposing an unreasonable burden" on FAFER by requesting the information to be submitted in particular form, 19 U.S.C. § 1677m(c)(1); (3) the "information [supplied by FAFER was] not so incomplete that it [could not] serve as a reliable basis for reaching the applicable determination"; and (4) "the information [could have been used by Commerce] without undue diffi-

culties." 19 U.S.C. § 1677m(e). Commerce, therefore, had the right to determine that FAFER's mere statements that: (a) FAFER's G&A expenses did include employees wages and charges that "have already been taken into account," Pl.'s Br. App. 13; and (b) FAFER's accounting system does not "distinguish between direct and indirect labor costs" due to its structural deficiencies, Pl.'s Reply at 6, n.7, were insufficient under the requirements posed by 19 U.S.C. §§ 1677m(c)(1) and (e). Consequently, Commerce was justified in resorting to facts available<sup>2</sup> under the mandate of 19 U.S.C. §§ 1677e(a) and (b).<sup>3</sup>

#### 4. Commerce's Use of the Imputed Commission as a Proxy for FAFER's Indirect Selling Expenses

##### a. Contentions of the Parties

Commerce contends that because "in calculating [FAFER's] CEP, Commerce must deduct from the price to an unaffiliated purchaser various expenses, including indirect selling expenses," Commerce acted reasonably by using the "commission amount derived from FAFER's \* \* \* response" as a proxy for the missing data on FAFER's indirect selling expenses. Def.'s Mem. at 34-35 (citing to *Final Results*, 63 Fed. Reg. at 2963). Domestic Producers: (1) support Commerce's contention, see Domestic Producers' Resp. at 12-38; and (2) point out that Commerce's action was reasonable because FAFER's indirect selling expenses would be an amount near the amount to which Commerce arrived on the basis of facts available. See *id.* at 26.

FAFER argues that Commerce was not entitled to rely on FAFER's commission rate because the "rate [is] known not to be applicable" in view of the particular facts of the case. Pl.'s Reply at 18-20.

##### b. Analysis

Making a determination based on facts available, Commerce should: (1) strive to arrive to "the most reasonable estimate," see Def.'s Mem. at 34; and (2) rely on the data that has a "rational relationship \* \* \* [to] the matter \* \* \*." *National Steel*, 18 CIT at 1132, 870 F. Supp. at 1136 (quoting *Manifattura Emmepi S.p.A. v. United States*, 16 CIT 619, 624, 799 F. Supp. 110, 115 (1992)).

The sale at issue was made by FAFER with the assistance of Charleroi, and it was the only sale of subject merchandise that FAFER made during

<sup>2</sup>Commerce asserted that in reaching its determination, Commerce had the right to rely and actually relied on 19 U.S.C. § 1677e(b), the subsection allowing the use of adverse facts available, in addition to relying on 19 U.S.C. § 1677e(a). See Def.'s Mem. at 34. Commerce fails to make a distinction between the use of facts available provided for in 19 U.S.C. § 1677e(a) and the use of adverse facts available reserved for the determinations concerning those parties that "fail to cooperate by not acting to the best of [their] abilities." 19 U.S.C. § 1677e(b). While the shortcomings contained in FAFER's data empowered Commerce to resort to 19 U.S.C. § 1677e(a), FAFER was sufficiently cooperative, thus precluding Commerce's reliance on 19 U.S.C. § 1677e(b). Compare *Transcom, Inc. v. United States*, 24 CIT \_\_\_\_\_, 121 F. Supp. 2d 690, 704-05 (2000).

<sup>3</sup>FAFER argues that because: (1) FAFER explained FAFER's cost of production analysis system to Commerce in great detail; and (2) Commerce verified the reported costs, such verification constitutes an implied admission by Commerce that Commerce found FAFER's statements with regard to indirect selling expenses satisfactory. See Pl.'s Br. at 9-20. Commerce's verification, however, is nothing more than the act of reconciling FAFER's reported costs to the information contained in financial statements of consolidated companies. See Def.'s Mem. at 32 and Ex. 9. The process of verification does not imply Commerce's endorsement of each expense item. See *id.* As Commerce correctly points out, "FAFER's lengthy analysis of the cost verification cannot alter the fact that FAFER did not report its indirect selling expenses as specifically requested by Commerce." *Id.* at 33 (emphasis supplied).

the POR. While there is no evidence on the record showing that Charleroi received any form of compensation under FAFER's general policy commission rate, there is conflicting data on record suggesting that FAFER might have incurred specific indirect selling expenses in the course of the transaction. See Pl.'s Reply at 19-22; Def.'s Mem. at 35-36 and Ex. 6, 12.

Commerce has the practice of using qualified data as a proxy for the data missing from the record. See, e.g., *Final Results of Antidumping Administrative Review of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China*, 62 Fed. Reg. 61,276, 61,277 (Nov. 17, 1997); *Preliminary Results of New Shipper Antidumping Duty Administrative Review of Certain Stainless Steel Wire Rod From India*, 62 Fed. Reg. 6171 (Feb. 11, 1997). Commerce, however, may neither use the substitute data out of context, see *Manifattura Emmepe*, 16 CIT 619, 799 F. Supp. 110, nor "resort to [the facts available] as an easy method to dispose of a case." *NTN Bearing Corp. of Am. v. United States*, 17 CIT 713, 720, 826 F. Supp. 1435, 1441 (1993). While Commerce's resort to the facts available was justified, the Court shares FAFER's bewilderment about Commerce's choice to use the only piece of data admittedly unrelated to the transaction at issue as a proxy for FAFER's indirect selling expenses. See Pl.'s Reply at 19-22; Def.'s Mem. at 35-36 and Ex. 6, 12. There could be no rational relationship between a matter and a data that expressly does not apply to that matter under the particular facts of the case. Compare *National Steel*, 18 CIT at 1132, 870 F. Supp. at 1136; *Consolidated Bearings Co. v. United States*, 2001 Ct. Intl. Trade LEXIS 74 at \*29-30, Slip Op. 2001-66 at 24 (2001) (quoting *Madison Metro. Sch. Dist. v. School Dist. Boundary Appeal Bd.*, 1998 Wisc. App. LEXIS 1200 (Wis. Ct. App. 1998), quoting in turn *Kammes v. Mining Inv. & Local Impact Fund Bd.*, 340 N.W. 2d 206, 213 (Wis. Ct. App. 1983), and stating that "a rational course of conduct requires [that] \* \* \* [t]he gap between the facts and the conclusion must be filled"). Considering that there is no dispute about the inapplicability of FAFER's actual general commission to the sale at issue, Commerce's use of such commission as a proxy for FAFER's indirect selling expenses is unreasonable.<sup>4</sup>

## *B. Commerce's Determination that FAFER's Antidumping Duties Have Been Absorbed*

### *1. Background*

During the review, Commerce provided FAFER with an opportunity to submit relevant evidence and considered all submitted evidence in reaching its final determination. See *Final Results*, 63 Fed. Reg. at 2964.

In the *Preliminary Results*, Commerce determined that antidumping duties have been absorbed by FAFER on one hundred percent of its

<sup>4</sup>The mere possibility that FAFER's indirect selling expenses could be an amount near the amount to which Commerce arrived on the basis of facts available, see *Domestic Producers' Resp.* at 26, cannot serve as a valid argument in view of Commerce's admitted obligation to arrive at "the most reasonable estimate," see Def.'s Mem. at 34 (emphasis supplied), that is, the estimate most rational under the circumstances rather than the most similar.

United States sales because Commerce: (1) had preliminarily determined that there was a dumping margin on one hundred percent of FAFER's sales; and (2) could not conclude from the record that an unaffiliated purchaser in the United States would pay the ultimately assessed duty. See 62 Fed. Reg. at 48,217. Commerce, however, allowed FAFER to submit (within 15 days after publication of the *Preliminary Results*) evidence that unaffiliated purchasers in the United States would pay the ultimately assessed duty charged to affiliated importers. See *id.* In response, FAFER submitted a very brief letter by an unaffiliated purchaser stating that the purchaser "irrevocably" committed itself to pay any antidumping duty on merchandise acquired from FAFER "if such duty is assessed upon final determination by \* \* \* Commerce." Def.'s Mem., Ex. 11. Unsatisfied with the deficiencies of this promise,<sup>5</sup> Commerce made further inquiries of whether there has been a modification to the existing sales contract other than this very brief letter. See *id.*, Ex. 6, 14. FAFER responded that "[t]here has been no modification to the existing contract" and did not explain why its customer would agree unilaterally to pay an unspecified amount at an unspecified time without apparent consideration. *Id.*, Ex. 14. Consequently, Commerce concluded that: (1) the evidence on the record did not demonstrate the existence of an enforceable agreement to pay the full amount of the assessed duties; and (2) "antidumping duties have been absorbed by FAFER on one hundred percent of its [United States] sales." *Final Results*, 63 Fed. Reg. at 2964.

2. *Commerce's Right to Conduct an Ad Hoc Determination Without Promulgating a Definite Criteria*

a. *Contentions of the Parties*

FAFER contends that Commerce's finding that FAFER absorbed antidumping duties through its United States sales affiliate, Charleroi, was "contrary to the facts on the record" and is premised on "faulty logic" because Commerce provided "no substantive criteria \* \* \* for trade participants or even counsel to follow in establishing non-absorption." Pl.'s Br. at 28 (emphasis in original).

Commerce maintains that its determination that FAFER absorbed antidumping duties was reasonable, and "[t]he fact that FAFER's evidence was found to be insufficient \* \* \* does not mean that there were no substantive criteria to follow." Def.'s Mem. at 40. Domestic Producers support Commerce's contentions. See Domestic Producers' Resp. at 39-44.

b. *Analysis*

The duty absorption inquiry is a relatively new feature of Commerce's antidumping investigation. See *Notice of Proposed Rulemaking and Request for Public Comments on Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. 7308, 7313 (Feb. 27, 1996) (giving notice that such

<sup>5</sup> The contractual agreement failed to state, among other things, the consideration and the time of performance. See *Final Results*, 63 Fed. Reg. at 2964.

inquiries are to be conducted by Commerce). Commerce clarified that such inquiries have little precedent and, therefore, Commerce indicated that it would proceed on an *ad hoc* basis until sufficient experience is collected. See *Final Rule on Antidumping Duties; Countervailing Duties*, 62 Fed. Reg. 27,296, 27,318 (May 19, 1997). Commerce specifically stated that Commerce "ha[s] not adopted \* \* \* substantive duty absorption criteria [because Commerce] will need experience with absorption inquiries before it is able to promulgate such criteria." *Id.*

Commerce's right to conduct the absorption inquiry is provided for in 19 U.S.C. § 1675(a)(4) (1994). The statute clarifies that

[d]uring any review [duly initiated, Commerce], if requested, shall determine whether antidumping duties have been absorbed by a foreign producer or exporter subject to the order if the subject merchandise is sold in the United States through an importer who is affiliated with such foreign producer or exporter.

19 U.S.C. § 1675(a)(4).

There is nothing in the language of section 1675(a)(4) requiring Commerce to specifically articulate the standard of what constitutes duty absorption prior to conducting a duty absorption inquiry. Conversely, the statutory language that Commerce "shall determine whether antidumping duties have been absorbed" demonstrates clear congressional mandate allowing Commerce to engage in the rulemaking processes traditionally used by an agency, including reaching a determination after examining the particular circumstances of the case without formally promulgating an allinclusive standard. In aspiring to create a detailed standard, an agency is expected to accumulate technical expertise and draw from the monitoring of the regulated industry. See, e.g., *Natural Resources Defense Council, Inc. v. U.S. EPA*, 859 F.2d 156, 210 (D.C. Cir. 1988).

[An] administrative implementation of a particular statutory provision [is valid and] qualifies for *Chevron* [*U.S.A. Inc. v. National Resources Defense Council, Inc.*, ("Chevron"), 467 U.S. 837, 842-43 (1984)] deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency's power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.

*United States v. Mead Corp.*, 121 S. Ct. 2164, 2171 (2001).

Commerce is correct in asserting that demarcated guidelines are not an indispensable part of the criteria that an agency uses in reaching a determination. Accord Def.'s Mem. at 40. Commerce was entitled to make a determination on an *ad hoc* basis by applying Commerce's expertise to the particular facts of the case at bar, see *Natural Resources Defense Council, Inc.*, 859 F.2d at 210, and postpone the promulgation of a substantive duty absorption criteria until sufficient information is gathered.

## 2. Reasonableness of Commerce's Determination

### 1. Contentions of the Parties

FAFER alleges that Commerce's determination that FAFER's anti-dumping duties have been absorbed on one hundred percent of FAFER's United States sales is an "unacceptable exercise of arbitrary" judgment. Pl.'s Br. at 29. FAFER maintains that the letter by an unaffiliated purchaser supplied by FAFER to Commerce contained an "unqualified commitment to pay the antidumping duties" and constituted sufficient evidence that FAFER's antidumping duties have not been absorbed. *See id.*

Commerce asserts that FAFER's antidumping duties have been absorbed because Commerce determined that "there was no [valid] contract for the unaffiliated customer to pay the ultimately assessed duties." Def.'s Mem. at 42. Commerce contends that it reasonably refused to accept the commitment letter as sufficient evidence to the contrary because the letter: (1) was an unenforceable promise "to pay an uncertain amount, at an uncertain time, under uncertain circumstances;" and (2) failed to provide for a proper contractual consideration. *See id.*

### 2. Analysis

In the *Preliminary Results*, 62 Fed. Reg. at 48,217-18, Commerce stated that it would consider evidence that unaffiliated purchasers in the United States would pay the ultimately assessed duty charged to affiliated importers. Upon FAFER's submission of the record information, Commerce examined the terms of sale, first, between FAFER and Charleroi, and then between Charleroi and its unaffiliated United States customer, and arrived at the conclusion that the only relevant piece of evidence provided by FAFER, that is, the agreement letter, was unenforceable due to the lack of either consideration or certainty of amount, time, or conditions. *See* Def.'s Mem. at 42.

The Court holds that Commerce's conclusion was reasonable. It is axiomatic that while the uncertainty of amount, time and conditions could be sometimes cured by particular circumstances of the case, the lack of consideration makes a contract unenforceable. *See, e.g., Johnson v. Johnson*, 614 N.E.2d 348 (Ill. App. Ct. 1993); *Appolonio v. Baxter*, 217 F.2d 267 (6th Cir. 1954); *Robertson v. Miller*, 286 F. 503 (2nd Cir. 1922). FAFER's failure to cure this defect in the agreement letter left Commerce no choice but to arrive at the decision Commerce made. The mere fact that FAFER's evidence was deemed by Commerce insufficient to establish that an unrelated purchaser would, in fact, pay the duties ultimately assessed, means neither that Commerce's conclusion was faulty, nor does it mean that Commerce's determination that FAFER's anti-dumping duties have been absorbed on one hundred percent of FAFER's United States sales was unreasonable. *See Chevron*, 467 U.S. 837. In view of the foregoing, Commerce properly determined that FAFER's anti-dumping duties have been absorbed on one hundred percent of FAFER's United States sales.

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#### CONCLUSION

This case is remanded to Commerce to: (1) examine the record to determine what data should be used as a substitute for FAFER's indirect selling expenses; and (2) take further actions not inconsistent with this opinion.

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